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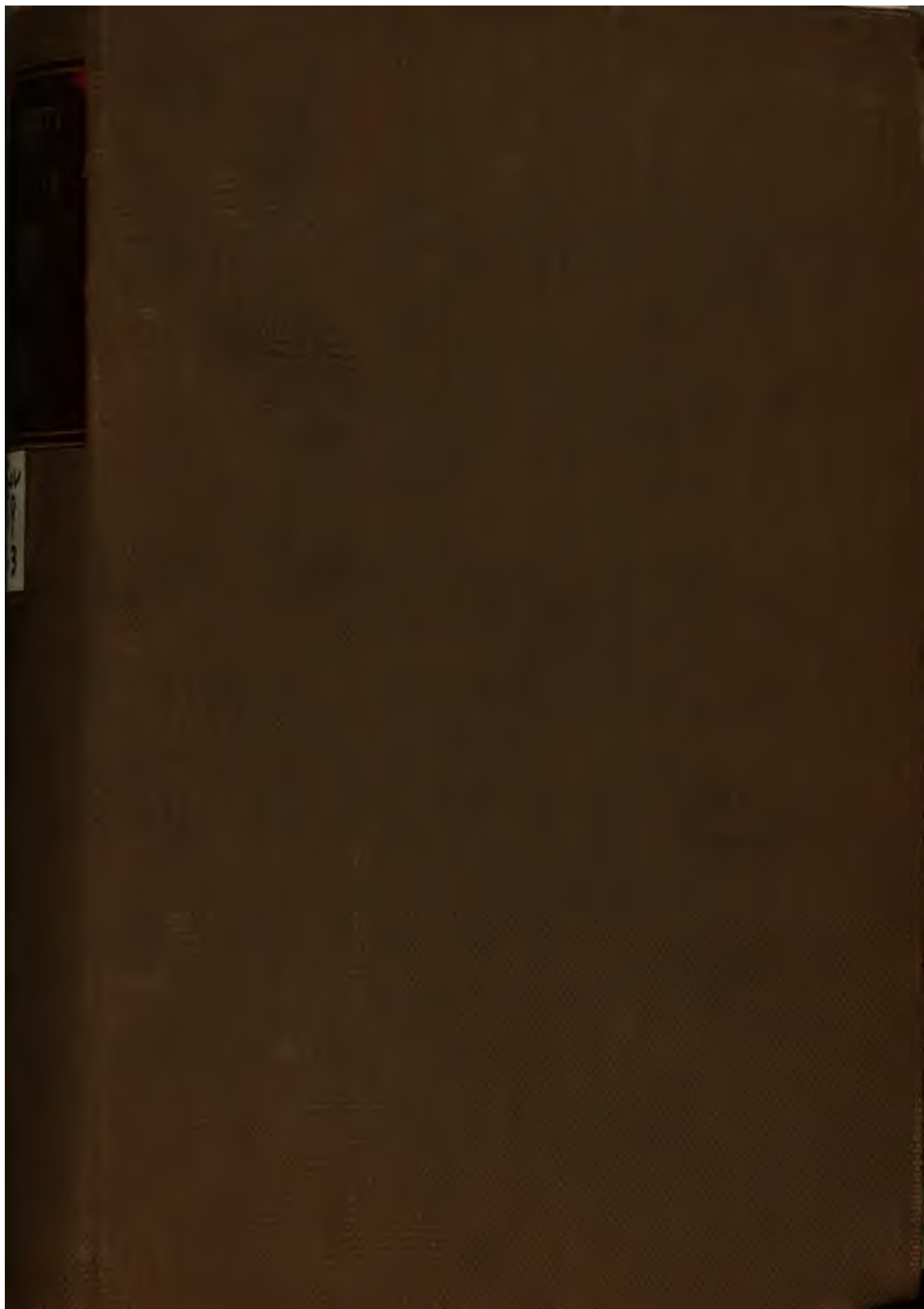
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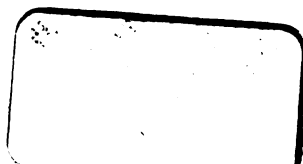
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BY
JOHN MACDONELL, Esq., C.B., LL.D.
AND
EDWARD MANSON, Esq.

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χρήσιμον."—ARIST. *Pol.* II. 1.

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The Hon^{ble} Oliver Wendell Holmes
Chief Justice of the Supreme Court of the United States

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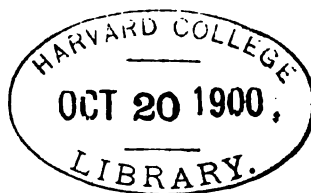
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CONTENTS OF No. 1, 1900.

	PAGES
1. COUNCIL AND EXECUTIVE COMMITTEE OF THE SOCIETY.	5-7
2. THE HON. OLIVER WENDELL HOLMES, <i>Chief Justice of the Supreme Court of Massachusetts.</i> (WITH PORTRAIT.) NOTICE BY SIR FREDERICK POLLOCK, BART.	9-10
3. THE ENGLISH LAW OF NATIONALITY AND NATURALISATION BY EDWARD LOUIS DE HART, ESQ., M.A., LL.B.	11-26
4. MOHAMMEDAN LAW IN INDIA: ITS ORIGIN AND GROWTH BY SIR RAYMOND WEST, K.C.I.E.	27-44
5. MARTIAL LAW IN REBELLION BY G. G. PHILLIMORE, ESQ.	45-72
6. UNFAIR COMPETITION IN GERMANY BY JULIUS HIRSCHFELD, ESQ.	73-74
7. THE ENGLISH STATUTE BOOK BY SIR COURTENAY ILBERT, K.C.S.I.	75-85
8. MODES OF LEGISLATION IN THE BRITISH COLONIES:	
(a) CYPRUS BY A. G. LASCELLES, ESQ., <i>Queen's Advocate.</i>	86-92
(b) VICTORIA BY LORD BRASSEY, <i>Governor of Victoria.</i>	93-97
(c) CEYLON BY C. P. LAYARD, ESQ., <i>Attorney-General.</i>	98-102
(d) BARBADOS BY SIR CONRAD REEVES, <i>Chief Justice.</i>	102-109
(e) LEEWARD ISLANDS BY W. H. STOKER, ESQ., <i>Attorney-General.</i>	110-113

	PAGES
(f) BRITISH ISLANDS IN THE WESTERN PACIFIC	113-115
(g) THE FALKLAND ISLANDS	115-117
BY THE HON. W. GRAY WILSON, C.M.G., <i>Governor and</i> <i>Chief Justice.</i>	
9. COMPARATIVE VIEWS OF CONTRABAND	118-130
BY JOHN M. GOVER, ESQ.	
10. THE TEACHING OF LAW IN FRANCE	131-136
BY THOMAS BARCLAY, ESQ.	
11. SOUDAN CRIMINAL LAW	137-140
BY W. F. CRAIES, ESQ.	
12. SKETCH OF THE OTTOMAN LAND CODE FOR CYPRUS	141-150
BY MR. JUSTICE MIDDLETON.	
13. THE AUSTRALASIAN FEDERATION BILL	151-172
14. NOTES	173-192
Debentures Charging French Assets	173
French Criticism of English Bankruptcy Law	174
Legislation in the United States	175
The Australian Federation Scheme	176
French Penal Settlements	179
Legal Education for the Empire	180
Contradictory Versions of Statute	180
Undue Preference as to Colour	181
The Congo Codes	181
Perjury in Bengal	182
Military Courts	182
Legitimation by Subsequent Marriage in Queensland	183
The New Queensland Criminal Code : Some Points in the Draft Bill	184
"Actor sequitur Forum Rei"	185
Free Advocacy	186
The Meaning of "Liquor"	186
Privy Council Appeals	186
The Size of Colonial Statutes	187
Private Property at Sea	189
What is "Territory" ?	189
The Congress of Comparative Legislation	190
Court for the Trial of High Crimes and Misdemeanours	190
The Hague Conference	190
Mr. Haldane's Proposal as to the Final Court of Appeal of the Empire	191
Injuries by Animals and the Law of Canada	191
Gang Rape in India	192
An English School of Law in Egypt	192

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HON. OLIVER WENDELL HOLMES,

CHIEF JUSTICE OF THE SUPREME COURT OF MASSACHUSETTS.

WE are indebted to Sir Frederick Pollock for the portrait of the distinguished judge and author Chief Justice Holmes, of Massachusetts. Sir Frederick Pollock writes thus with respect to his friend :

"The following statement of facts is authorised by Chief Justice Holmes, and may therefore be taken as accurate. My learned friends, the Editors, have asked me to add a few remarks of my own. As a friendship extending over a quarter of a century, and intimate ever since its first few years, disqualifies me from assuming an impartial attitude, I will merely speak for myself, and say that, among men of anything near my own standing, Chief Justice Holmes is one of the two from whom I have learnt most. The other, about as much junior to me as Chief Justice Holmes is senior, is my friend Mr. F. W. Maitland.

"F. POLLOCK."

Oliver Wendell Holmes, the son of the well-known novelist and poet, was born in Boston, March 8th, 1841. At the outbreak of the Civil War he joined the 4th Battalion of Infantry, then at Fort Independence, Boston Harbour, where he wrote the poem which he delivered on class day. In the Battle of Ball's Bluff, October 21st, he was wounded in the breast, and was also struck in the abdomen by a spent ball. On March 23rd, 1862, he was commissioned captain. He received a wound in the neck at Antietam, September 17th. In February, 1863, he was Provost-Marshal of Falmouth, Virginia. At Marye's Hill, near Fredericksburg, he received a third wound, in the heel. He was commissioned lieutenant-colonel, 20th Massachusetts, July 5th, 1863, and in 1864 he was appointed A.D.C. on the Staff of Brigadier-General H. G. Wright, and served during General Grant's campaign, down to Petersburg, returning to Washington with the Sixth Corps when the capital was threatened.

In September he entered the Harvard Law School, and received his LL.B. in 1866. In December, 1865, he entered the law office of Hon. R. M. Morse, Boston. He was admitted to the Suffolk Bar, March 4th, 1867, and subsequently was admitted to practise before the United States Supreme Court. He practised his profession first in partnership with his brother, afterward in the firm of Shattuck, Holmes & Munroe. In 1870-1

he taught Constitutional Law in Harvard College, and in 1871-2 was University Lecturer on Jurisprudence. He married Miss Fanny Dixwell, daughter of Epes Sargent Dixwell, Esq., of Cambridge, Massachusetts, 1872.

In 1873 he published in four volumes the twelfth edition of *Kent's Commentaries*, with elaborate notes. From 1870 to 1873 he was editor of *The American Law Review*, Vols. V., VI., and VII., and wrote for this review the following articles: (1) "Codes, and the Arrangement of the Law"; (2) "Ultra Vires"; (3) "Misunderstandings of the Civil Law"; (4) "Grain Elevators"; (5) "Arrangements of the Law: II., Privity"; (6) "The Theory of Torts"; (7) "Primitive Notions in Modern Law" (two articles); (8) "Possession"; (9) "Common Carriers and the Common Law"; (10) "Trespass and Negligence"; and many shorter articles. An essay by him on "Early English Equity" may be found in *The English Law Quarterly Review*, April, 1885; two articles on "Agency" in *The Harvard Law Review*, March and April, 1891; "Privilege, Malice, and Intent," *Harvard Law Review*, May, 1894; "Executors," *Harvard Law Review*, May, 1895; address by, on "Boston Law School," *Harvard Law Review* and *Scotch Juridical Review*, April, 1897; "The Theory of Legal Interpretation," *Harvard Law Review*, February, 1899; "Law in Science and Science in Law," address before New York State Bar Association, *Harvard Law Review*, March, 1899. A volume of his speeches was published by Little, Brown & Co. in 1891. In the winter of 1880 he delivered a series of lectures on the Common Law, in Boston—one of the Lowell Institute courses. He published a volume upon the same subject, 1881, which was characterised as "the most original work of legal speculation which has appeared in English since the publication of Sir Henry Maine's *Ancient Law*." It has been translated into Italian.

Mr. Holmes was appointed to a new professorship in the Harvard Law School in 1882, but he had barely entered upon his duties there when (December 8th) Governor Long appointed him an associate justice of the Supreme Court, in place of Judge Otis P. Lord. He was appointed Chief Justice of the same Court, August 2nd, 1899. He is a member of the Massachusetts Historical Society, and was a Fellow of the American Academy. It may be mentioned that at the same time that his father was receiving D.C.L. from Oxford (in 1886) he was receiving the degree of LL.D. from Yale.

THE ENGLISH LAW OF NATIONALITY AND NATURALISATION.

[Contributed by EDWARD LOUIS DE HART, ESQ., M.A., LL.B.]

Natural-Born Subjects at Common Law.—The Common Law of England, under the influence of feudalism, made the national character of any person depend, generally speaking, on the place of his birth, not on his parentage. The rule of the Common Law is thus stated in the Report of the Royal Commission of 1868 on the laws of naturalisation and allegiance :

All persons, of whatever parentage, born within the dominions and allegiance of the Crown are by the Common Law natural-born British subjects ; all persons, on the other hand, of whatever parentage, born beyond its dominions and out of its allegiance, were by the Common Law regarded as aliens.

This definition of natural-born subjects is correct, though incomplete, if the term "dominions and allegiance of the Crown" be understood to mean the dominions and allegiance of the Sovereign in a personal sense. Thus a Scotsman born after the accession of James VI. to the Crown of England, and before the union, was not an alien in England¹ ; and while the Crowns of the United Kingdom and of Hanover were vested in the same person, every Hanoverian was in law a British subject.²

In the case of protected territories there may possibly be a difficulty in determining whether the territory forms part of the dominions of the Crown. The fact that a protectorate exists is perhaps not sufficient to prove that the territory is British. The question may depend on the extent of the powers and jurisdiction exercised by the Crown, whether directly or mediately through a chartered corporation. In the *Jameson* case it was necessary to prove that an offence under the Foreign Enlistment Act had been committed in Her Majesty's dominions. The Lord Chief Justice, after reading a number of Orders in Council and Proclamations to the jury, left to them the question whether the Crown did in fact exercise dominion and sovereignty at Pitsani, the place from which one of the expeditions started.

¹ *Calvin's Case*, 7 Co. 1.

² See the judgment of the Court in the Stepney Election Petition Case, *Isaacson v Durant*, 17 Q.B.D. 54.

Every person born on a British ship on the high seas in the allegiance of the Crown is at Common Law a British subject.¹ A British ship on the high seas has often been described as British territory, a figure of speech which embodies the principle that "by the received law of every nation a ship on the high seas carries its nationality and the law of its own nation with it."² Whether mere birth on a British ship in foreign waters confers the right of British nationality is a point on which there is no actual decision. It is, however, clear that the Admiralty jurisdiction extends over British vessels in the tidal navigable waters of foreign States below bridges,³ not only in respect of the persons belonging to the ship, but also in respect of other persons on board.⁴ A ship so situated has been likened to a floating island, where the authority and protection of the British law prevail.⁵

"The true principle," says Lord Coleridge, "is that a person who comes on board a British ship where English law is reigning places himself under the protection of the British flag, and as a correlative, if he thus becomes entitled to our law's protection, he becomes amenable to its jurisdiction."⁶

These cases afford strong grounds for the belief that birth on a British ship in foreign waters within the Admiralty jurisdiction confers British nationality. Where, on the other hand, the jurisdiction and the protection of the law do not extend to all persons on board a British ship, a person born on the ship cannot, it is submitted, be a British subject by virtue of the Common Law rule. A ship in foreign parts, when in dock, in a part of a harbour where the tide does not ebb and flow, or in a river above locks or bridges, is not within British jurisdiction.⁷ Nor apparently can this jurisdiction extend to an artificial channel, unless perhaps it be a tidal waterway where great ships go. Thus it may be that birth on a British ship in the Elbe and in the North Sea Canal will have opposite results as regards national status.

A curious question might arise as to the nationality of a person born on a foreign ship on the open sea within three miles of the coasts of the British dominions. Whether these waters are actually British territory, or whether in such parts of the sea there is merely a limited right sanctioned by International Law to exercise jurisdiction for certain purposes, is a point which in one case was exhaustively discussed by fourteen learned judges.⁸ Unfortunately there was a hopeless conflict of opinion among them; and the point is not settled by the Territorial Waters Act, 1878, which was the out-

¹ *Marshall v. Murgatroyd*, L.R. 6 Q.B. 31.

² Per *Cockburn, C.J.*, *R. v. Keyn*, 2 Ex. D. 63, 161.

³ *R. v. Anderson*, L.R. 1 C.C.R. 161.

⁴ *R. v. Carr*, 10 Q.B.D. 76.

⁵ Per *Byles, J.*, L.R. 1 C.C.R., at p. 168; per *Blackburn, J.*, *ibid.*, at pp. 163, 169.

⁶ 10 Q.B.D., p. 85.

⁷ *Thomas v. Lane*, 2 Sumner 1; per *Blackburn, J.*, L.R. 1 C.C.R. 164.

⁸ *R. v. Keyn*, L.R. 2 Ex. 63.

come of the decision in that case. Assuming the very doubtful proposition that this part of the sea is British territory to be correct, a distinction may possibly be drawn between a ship that is either entering or leaving a British port and a ship which is merely passing through British waters. Every ship, it is admitted, has a right to navigate peaceably on any part of the high seas ; and it may therefore be argued that those on board a passing ship have not placed themselves within the allegiance of the Crown. But if the waters in question are truly part of the British dominions, I find it difficult to resist the conclusion that every one born in them on a ship over which British jurisdiction can be exercised is a British subject. Whatever the law may be, there will probably be a consensus of opinion that the child of an alien born on a foreign ship should have no right to claim British nationality because the ship was at the time of the child's birth sailing within three miles of the British coast.

There are three exceptional cases in which persons born in British territory are not natural-born subjects. One is that of the children of foreign sovereigns. A foreign sovereign owes no obedience to the Crown. "Though the king be in a foreign kingdom, yet he is in law a king there."¹ His child therefore is not deemed to be born in the allegiance of the Crown. Some writers on International Law do not allow that a foreign sovereign can claim immunity from the local jurisdiction when he is travelling *incognito* ; but there is no English authority for this distinction, which would have very inconvenient results. A sovereign's suite share his immunities. Therefore, although the point is nowhere referred to, it seems clear that the child of an alien member of the suite, born on British soil while the parents are attached to the sovereign's person, is not a British subject.

The second case is that of the children of foreign ambassadors or other diplomatic agents accredited to the Crown. They are excepted, says Sir Alexander Cockburn,² because their fathers carry their own nationality with them. It would be better to say "because the ambassador who represents his sovereign does not (like other aliens when in the realm) owe obedience to the Crown." The *attachés* and other members of a foreign mission share the ambassador's privileges, as perhaps also do the servants of the embassy. The child of an alien member of an embassy ought, therefore, clearly to be considered an alien.

The immunities of a diplomatic agent, it is said, are extended to his family living with him.³ When the wife of an ambassador is living apart from her husband, she may be said to be living in the obedience and protection of the Crown ; and her child born under these circumstances is perhaps a British subject.

There is no reason to suppose that the exception would apply to the child of a British subject who is a member of a foreign legation. Even if

¹ 7 Co. 156.

² *Nationality*, p. 7.

³ Hall, *International Law*, p. 184.

the Courts in certain cases decline to exercise jurisdiction over the parent, he still owes allegiance to the Crown.¹ Nor does the exception seem applicable to the child, born here, of a diplomatic agent accredited to a foreign State. The father does not represent his sovereign in this country, and consequently does owe temporary allegiance to the Crown.²

The third case is that of the children of alien enemies born during a hostile occupation of British territory:

If enemies should come into any of the king's dominions and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the king, though he be born within his dominions, for that he was not born under the king's legiance or obedience.³

By parity of reason the child of an alien enemy, born on a captured British ship in the possession of a prize crew, would not be born in the allegiance of the Crown.

I apprehend that the rule can be stated more widely than on the authority of the dictum in *Calvin's* case it is usually stated. Presumably an alien friend does not, on coming into British territory during its hostile occupation, owe temporary allegiance to the Crown, and his child born there is not, it is submitted, a British subject. To take an example suggested by recent events: if a German had gone to Glencoe during its occupation by the Boers, his child born at Glencoe would not be a British subject, though Glencoe is in Natal.

Some of the vague expressions used by writers on International Law as to the extritoriality of ships of war suggest the conclusion that a person born on a foreign public vessel in a British port is not born in the allegiance of the Crown. There is much uncertainty with regard to jurisdiction over a ship of war.⁴ The ship itself, notwithstanding a dictum of Sir Robert Phillimore's in the *Charkieh*,⁵ is probably not liable to an action *in rem*.⁶ And, speaking generally, a ship of war is by the practice of nations exempt from the local jurisdiction, but it is at the same time under an obligation to respect the local laws. Three of the Royal Commissioners of 1876, Sir Robert Phillimore, Sir M. Bernard, and Sir Henry Maine, considered that the captain of a foreign ship of war and those under his command are not amenable to the local jurisdiction. Sir Alexander Cockburn rigorously maintained the contrary. There is no decision on the point; and it is with much doubt that I have formed the opinion that a person born on a foreign public vessel may at Common Law be a natural-born English subject.

¹ Wheaton, *International Law*, 3rd English ed., p. 223.

² Dicey, *Conflict of Laws*, p. 177.

³ *Calvin's Case*, 7 Co. 18.

⁴ See the Report of the Royal Commission of 1876 on Fugitive Slaves, in which the matter is discussed.

⁵ L.R. 4 A. & E., at p. 93.

⁶ See the American case, *Schooner Exchange v. M'Fadden*, 7 Cranch 116.

The general rule of the Common Law is that persons born out of the dominions of the Crown are born out of its allegiance.

"This maxim of the law," says Blackstone, "proceeded upon the general principle that every man owes natural allegiance where he is born, and cannot owe two such allegiances or serve two masters at once. Yet children of ambassadors born abroad were always held to be natural-born subjects, for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent, so with regard to the son also, he was held by a kind of *postliminium* to be born under the King of England's allegiance, represented by his father the ambassador."¹

The statement in *Calvin's case*,² that this rule only applied to the children of ambassadors whose wives were Englishwomen, may be disregarded. Even if correct it is immaterial, now that by Statute the national character of a husband determines that of his wife. The children of *attachés* and other members of British legations (themselves British subjects) are no doubt in the same position as the children of the ambassadors. The child is probably not a natural-born subject under this rule when born in a State other than that to which the ambassador is accredited.

The children of the king have always been considered an exception to the rule. An ambassador's privileges are possessed by him as the representative of his sovereign, and the rule as to an ambassador's children applies *à fortiori* to those of the sovereign himself. In 1343 the well-known declaration of the Parliament was made, that the children of the king born abroad could bear the inheritance.³ The declaration was repeated in the recital of the Act 25 Edw. III., St. 1.

In *De Geer v. Stone*⁴ Mr. Justice Kay held that the rule as to the nationality of the children of British ambassadors abroad does not extend to the children born in foreign parts of military officers in the service of the Crown. The cases are not analogous, for the rule in the case of an ambassador's children depends probably on the fact that the father represents the sovereign.⁵ In *De Geer v. Stone* the child was born in the territory of an ally, and it may be asked whether, if it had been born during a hostile occupation of the enemy's territory, the result would not have been different. The answer is, I think, that the only distinction known to the Common Law is between British and foreign territory, and that a mere military occupation of the latter does not change its character. The question has but little practical importance, in consequence of legislation which now will be noticed. Cases in which British nationality will be claimed, as in *De Geer v. Stone*, for three generations born abroad, are not likely to occur often.

¹ *Bl. Com.*, vol. i., p. 373.

² 7 Co. 18.

³ *Parliament Roll*, 17th Edw. III., set out in Mr. Abbot's *Memorandum* annexed to the Report of the Royal Commission of 1868; also cited 22 Ch. D. 245.

⁴ 22 Ch. D. 243.

⁵ See *per* Sir Robert Phillimore in the *Charkieh*, L.R. 4 A. & E., at p. 88.

Natural-born Subjects by Statute.—The Statutes which have conferred the status of a natural-born subject upon persons born out of the territory can be briefly mentioned. 25 Edw. III., St. 1, made all children born beyond the sea whose fathers and mothers were at the time of their birth "at the faith and legiance" of the king capable of inheriting. This Statute was construed to confer this right on the children of English fathers and foreign mothers. By 7 Anne, c. 5, the children of natural-born subjects born out of the allegiance of the Crown are made natural-born subjects for all purposes whatever. This Statute was explained by 4 Geo. II., c. 21, to relate to children whose *fathers* are, at the time of the children's birth, natural-born subjects of the Crown. The Act of Geo. II. (s. 2), expressly withholds the right of British nationality from the child when the father has been attainted of treason, or cannot return to the United Kingdom except by license without incurring the penalties of treason or felony, or is at the time of the child's birth in the actual service of a foreign enemy. Attainders were abolished in 1870, and the first and second exceptions have now no importance. By 13 Geo. III., c. 21, s. 1, all persons born out of the legiance of the Crown are natural-born subjects, whose fathers are by virtue of 4 Geo. II., c. 21, natural-born subjects. In 4 Geo. II., c. 21, it is stated that the father must be a natural-born subject at the time of the child's birth.¹ Clearly, if at this time the father has ceased to be a British subject the child is not a natural-born subject. This was expressly decided in *Doe d. Thomas v. Acklam*.² Therefore, as a British subject who becomes naturalised in a foreign country now loses his British nationality, a child of his born abroad after such naturalisation is not a natural-born subject.

The words "at the time of the birth of such children" are not to be found in 13 Geo. III., c. 21. The Act requires that the father shall be "entitled to all the rights and privileges of natural-born subjects." It can scarcely be doubted that this proviso relates to the time of the child's birth, so that no one born abroad can be a natural-born subject by virtue of either of these Acts, unless the father is still a British subject when the child is born. A posthumous child will, no doubt, be deemed to have been born at the time of the father's death.

Under these Acts the status of a natural-born subject cannot be obtained through the mother. Their effect is, shortly, that the children and the grandchildren on the son's side of every man who by the Common Law is a natural-born subject are themselves natural-born subjects, wherever they may have been born. The status of a natural-born British subject conferred by these Acts is merely a personal one; it is not made transmissible to descendants.³ Therefore, in general, when three generations have been

¹ A posthumous child is, no doubt, in the same position as if it had been born during the life of the father.

² 2 B. & C. 779.

³ *De Geer v. Stone*, 22 C.D. 243.

born abroad, the third generation cannot be natural-born subjects. As an illegitimate child is in law *nullius filius*, he is not within 4 Geo. II., c. 2, or 13 Geo. III., c. 21. Even his legitimation by the subsequent marriage of his parents does not bring him within these Acts.¹

Many foreign countries deal more generously with illegitimate children. Thus the illegitimate child of a Portuguese mother, born abroad, may elect for Portuguese nationality; and by the French law such a child may, if recognised by either parent, acquire his or her national status.

The Naturalisation Act, 1870, s. 7, gives to a naturalised British subject all the rights and privileges in the United Kingdom of a natural-born subject. The question has arisen whether by reason of this enactment the children and grandchildren, born abroad, of a naturalised subject are natural-born subjects under the Acts of 4 Geo. II. and 13 Geo. III.² In the Court of Appeal two of the judges gave no opinion on the point. Lord Justice Cotton thought, but did not find it necessary to decide, that the child of a naturalised subject, born abroad, is not a natural-born subject. His reason was that the privilege given by the Acts of Geo. II. and 13 Geo. III. is the privilege of the child, not the privilege of the father. This is the construction of these Acts adopted in *Fitch v. Weber*,³ though the point decided in that case was a different one. It follows that if a naturalised British subject goes to live abroad, and there has children, though he may remain a British subject, these children will not be British subjects unless they afterwards during infancy reside with him in the United Kingdom.⁴

Expatriation.—By the Common Law no British subject could voluntarily renounce his allegiance and nationality. In this sense British nationality was, as it has been expressed, indelible. But by the Common Law a native of British territory which has received a grant of independence, or has been ceded to a foreign power, does in general lose his British nationality if he remains domiciled in the territory when it ceases to be part of the dominions of the Crown.⁵ There may, however, be a treaty stipulation that he can elect to retain his British status, as was agreed when Heligoland was ceded to Germany in 1890. Mr. Westlake states the rule widely, as applying to all British subjects domiciled in the ceded territory,⁶ but it may be doubted whether the status of British subjects who are not natives is affected by a cession. Generally speaking, a native of ceded territory can by leaving it with the intention of remaining a British subject retain his national status.⁷

On the dissolution of the personal union which existed between the United Kingdom and Hanover when the Crowns of both were held by the

¹ *Shedden v. Patrick*, 1 Macq. 535.

² 6 Hare 51.

³ *In re Bourgeoise*, 41 Ch. D. 210.

⁴ Naturalisation Act, 1870, s. 10 (5).

⁵ *Doe d. Thomas v. Acklam*, 2 B. & C. 779; *Jephson v. Reira*, 3 Knapp 130.

⁶ Private International Law, s. 298.

⁷ *Doe d. Auchmuntz v. Mulcaster*, 5 B. & C. 771; and see *In re Bruce*, 2 C. & J. 436.

same sovereign, the subjects of the King of Hanover ceased to be British subjects.¹

Of the inconvenient results which sometimes followed from the doctrine that allegiance cannot be renounced it is at present unnecessary to speak. The Naturalisation Act, 1870, completely altered the law in this respect. It provided (s. 6) that every British subject in a foreign State, who not being under any disability voluntarily becomes naturalised there, ceases to be a British subject; s. 8 (1) that a married woman shall be deemed to be a subject of the State of which her husband is, for the time being, a subject; and s. 8 (2) that every child of a British subject (father or widowed mother) who during infancy has become resident in the country where the parent has become naturalised, and has by the law of that country also become naturalised there, ceases to be a British subject.

The Naturalisation Act also enables any person who is a natural-born subject, both of this and of another State, to make a declaration of alienage, if of full age and under no disability; and thereupon he ceases to be a British subject.

The rule of the Common Law was that marriage did not alter the national status of a woman, whether she was the British wife of an alien or an alien married to a British husband.² This rule has been entirely abrogated by s. 8 (1). The effect of s. 8 (1), as the late Mr. Hall pointed out,³ is that if an Englishwoman marries the subject of a State the law of which does not confer his national character upon her, she ceases to have any national status. The laws of most States certainly attribute to the wife the national character of the husband; but in one country, at any rate—*viz.* the Argentine Republic—marriage with a subject does not naturalise the wife.

The civil codes of most foreign countries have provided against a loss of national status in such a case. Art. 19 of the French Code Civil, for instance, is as follows:

A Frenchwoman who marries an alien follows the nationality of her husband, unless her marriage does not confer his nationality upon her, in which event she remains French.

The rule that a married woman takes the national character of her husband is unqualified. Therefore, if an Englishwoman marries a subject of a foreign State resident in England, though they continue to reside here, she ceases to be a British subject. In this respect the law of the United States is different.⁴

Mr. Hall was of opinion that when an Englishwoman marries an alien who has no national status, she does not lose her British nationality.⁵

¹ *Isaacson v. Durant*, 17 Q.B.D. 647.

² Cockburn, *Nationality*, p. 11.

³ *Foreign Jurisdiction*, p. 49.

⁴ *Comitis v. Parkerson*, 56 Fed. R. 556.

⁵ *Foreign Jurisdiction*, p. 50.

S. 8 (1) of the Naturalisation Act was probably intended to place the wife, as regards national status, in the same position as her husband. Yet when there is no foreign State of which he is a subject at the time of marriage, s. 8 (1) may be construed as being inoperative. If a woman should marry a native of a wholly uncivilised country, she would probably, according to Mr. Hall's view, also not lose her nationality. Such a country, he argues, is not a State. The term "State," he says, applies only to permanently established independent communities, formed with political objects, possessing a definite political organisation, and guided by a sense of moral obligation towards other communities.¹

Resumption of British Nationality.—Having enabled natural-born British subjects to renounce their allegiance, the Naturalisation Act provides for the resumption, by them, of their British nationality. The drafting of s. 8 by which this is effected is somewhat peculiar. The section runs thus: "A natural-born British subject who has become an alien in pursuance of this Act, and is in this Act referred to as a statutory alien, may" apply for a certificate of readmission to British nationality. The only natural-born subject who is referred to in the Act as a statutory alien is a widow who became an alien by her marriage. Therefore, if these words just quoted are to be construed in their ordinary sense, a widow so circumstarced is the only natural-born subject who can resume British nationality. It is, however, clearly shown, by the remainder of s. 8 and by s. 10 (4), that this is not the proper construction. S. 10 (4), for instance, deals with the case of a child whose father has resumed British nationality. S. 8 obviously means that every natural-born subject who has become an alien under this Act may be described as a statutory alien, and may under certain circumstances resume his nationality. For this purpose he must, by s. 8, perform the same conditions as an alien who wishes to become naturalised. He must, therefore, within a limited time (eight years under the existing regulations) have either resided five years in the United Kingdom or have served under the Crown for the same time, and must intend to continue this residence or service. The granting of the certificate is discretionary.

In foreign countries a subject who has lost his status through naturalisation elsewhere can usually resume his national character as soon as he returns with the intention of residing.

The period of five years seems an unduly long one, especially in the case of persons who in childhood became naturalised in a foreign State by reason of the naturalisation of a parent. In fact, it would be more just in such a case of involuntary expatriation to allow the child to resume his British nationality without any qualifying period, if within a limited time after attaining his majority he returns to the kingdom with the intention of residing.

¹ *Foreign Jurisdiction*, p. 130.

A widow being a natural-born British subject, who became an alien by her marriage, is expressly declared to be a statutory alien (s. 10 [2]). She cannot, therefore, resume British nationality until after five years' residence. In this respect foreign States are usually more liberal. Thus, when a Frenchwoman's marriage is dissolved by the death of her husband, or by divorce, she recovers her French nationality "with the authorisation of the Government, provided she resides in France or returns declaring that she intends to remain there."¹ A similar provision exists in most of the other foreign codes.

The status of a British subject married to a foreigner and afterwards divorced is not expressly dealt with in the Act. S. 10 (1) only says that "a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject." There is no express declaration, as in the case of a widow, that a divorced woman is a statutory alien. I have, however, already given my reasons for the conclusion that every natural-born subject who has become an alien in pursuance of the Act is a "statutory alien," whether expressly referred to as such or not. If this be so, it follows that the divorced woman remains an alien until she obtains a certificate of readmission to British nationality after fulfilling the conditions set out in s. 8.

By s. 10 (4):

Where the father, or the mother, being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother shall be deemed to have resumed the position of a British subject to all intents.

The word "resumed" causes much difficulty. A person can only resume, in the ordinary sense of the word, a status which he has lost. If the natural-born subject has become naturalised elsewhere, or has made a declaration of alienage, his children subsequently born abroad are not natural-born subjects. Are they "deemed to have resumed" the British nationality which they never possessed, by residing with the parent in the British dominions? Perhaps, as Mr. Dicey suggests,² the word "deemed" implies that they are to be legally treated as if they had resumed British nationality. Mr. Hall, on the other hand, was of opinion that such a construction is not possible, so that, according to his view, the provision only operates in favour of an infant who was born a British subject, and ceased to be one by the act of his parent.³

I think on the whole that the construction suggested by Mr. Dicey is the correct one, and that the words "deemed to have resumed" should be read as if they meant "shall be deemed to have been formerly a British subject and to have resumed the position of one."

¹ *Code Civil*, Art. 19. ² *Conflict of Laws*, p. 745. ³ *Foreign Jurisdiction*, p. 53.

That this construction is not altogether consistent with the wording of the section must be admitted. On the other hand, Mr. Hall's view does not give full effect to the words "every child." It makes them equivalent to "every child who was a natural-born British subject." If Mr. Hall was right, the remarkable result follows that, although when an alien by birth becomes naturalised in the United Kingdom, his children who become resident with him are naturalised with him, yet when a statutory alien regains his British nationality, his alien-born child remains an alien under precisely similar circumstances. It may safely be assumed that the legislature did not desire to place the children of statutory aliens in a less favourable situation than the children of aliens by birth. If the construction favoured by Mr. Dicey be the proper one, the further question arises, What is the status of the child who "resumes" British nationality? When the father obtains a certificate of readmission to British nationality, he is no doubt restored to the status of a natural-born subject. If the child was born a British subject, the result must be the same. But it is improbable that the Act would be held to do more than confer naturalisation on an alien-born child. If the words of the section had been "every child . . . shall be deemed to have resumed the position of a British subject or to have become a naturalised British subject," the law on this point would have been placed on a clear and satisfactory basis.

The use of the term "has become resident" in this sub-section and in the provision of s. 8 (2), relating to the children of British subjects naturalised abroad, has been adversely criticised. Mr. Dicey says that the expression is "deplorably vague." Its vagueness may, however, be thought a merit. What constitutes residence is a question of fact which may depend on a number of circumstances. The time spent in the country is only one factor. Thus, a child may spend most of the year in a school in one country, and yet may truly be said to be resident with its parents in another. Each case must be considered on its particular facts; and no definition of residence could be framed which would be a satisfactory test in all. Whether the question of residence be for the Courts or for the legal advisers of the Crown, it will be easier for them to come to a just conclusion when they are not fettered by any hard-and-fast definition.

The provision "every child who during infancy has become resident in the British dominions with such father or mother shall be deemed to have resumed the position of a British subject" is not altogether free from ambiguity in another respect. The child may have resided with the parent before the latter's resumption of British nationality, and have ceased so to reside, or he may be residing with the parent at the time, or he may only come into residence afterwards. The language of the clause is, however, perfectly general, and therefore it seems that residence with the parent at any time, whether before or after the parent regains his British status, is sufficient to make the provision applicable.

Mr. Dicey asks if "during infancy" means until the period of infancy has expired.¹ There seems to be no good reason for adopting such a forced construction of the words. The change of the term "has become resident during infancy" into "is resident on attaining his majority" is not required by the context.

Denization.—Denization is defined by Sir Alexander Cockburn as naturalisation conferred by the sovereign by virtue of the prerogative. The practice of conferring the status of a British subject upon an alien by making him a denizen is one of considerable antiquity. The right of creating denizens is exercised by the Crown by letters patent. Denization does not enable either the denizen or his children born before his denization to inherit real property.² This restriction is now, of course, without any importance, as the Naturalisation Act, 1870, has given aliens the same rights in the United Kingdom as natural-born subjects in respect of such property.

Denization is inferior to naturalisation under the present law, in that by 12 & 13 Wm. III., c. 2, s. 3, a denizen, except he be born of English parents, cannot be a privy councillor or a member of either House of Parliament, or hold any office of trust, or receive a grant of lands from the Crown. The only reason why denization is now of any value is that it enables the Crown to grant the status of a British subject to a foreigner who is not qualified by residence or service under the Crown to become naturalised; for there is no restriction upon the right to create denizens.

Naturalisation.—Naturalisation, unless denization is also understood by the term, can only be obtained under the Naturalisation Act of 1870, or by a special Act of Parliament.

Formerly aliens becoming naturalised were excluded by 12 Wm. III., c. 2, and 1 Geo. I., c. 4, from Parliament or the Privy Council, or offices of trust, or from taking a grant of land from the Crown. These provisions were repealed in 1844 by 7 & 8 Vict., c. 66, naturalisation under which did not, however, confer the right to sit in Parliament or become a privy councillor, or any right specially reserved in the certificate of naturalisation. 7 & 8 Vict., c. 66, was repealed by the present Naturalisation Act (that of 1870, 33 Vict., c. 14), which provides (s. 7) that an alien to whom a certificate of naturalisation is granted is entitled in the United Kingdom to all political and other rights of a natural-born subject.

A declaration follows that he shall not, when within the limits of the foreign State of which he was a subject previously to obtaining naturalisation, be deemed to be a British subject unless he has ceased to be a subject of that State by law or by reason of a treaty. It seems to follow by implication that, in every other State and in the Colonies, he has the status of a British subject. As by s. 16 the right of the Colonies to confer

¹ *Conflict of Laws*, p. 192.

² Chitty, *Commercial Law*, vol. i., No. 5, p. 151; Mr. Abbot's *Memorandum*, p. 8.

naturalisation is recognised, it may be argued that naturalisation in the United Kingdom is not intended to have effect in a colony. The validity of such naturalisation in a colony is, however, not inconsistent with the right of the colony to grant naturalisation within its limits.

It has been suggested that if an alien, having become naturalised elsewhere, afterwards becomes naturalised in the United Kingdom, this proviso does not apply to the State in which he was born, that not being "the foreign State of which he was a subject previously to obtaining a certificate of naturalisation." It is by no means clear that this is the proper construction of the Act: "previously to" may mean more than "at the time of" naturalisation; but if the Act had said "a foreign State" instead of "the foreign State," no doubt could have arisen as to its meaning.

In order to obtain naturalisation under the Act of 1870 an alien must (1) within a prescribed period (under the present regulations, eight years) have resided in the United Kingdom or been in the service of the Crown for five years; (2) intend, when naturalised, either to reside in the United Kingdom or to serve under the Crown (s. 7). Therefore an alien who is qualified by residence, but who intends to remove to any colony or other possession of the Crown, cannot be naturalised under this Act unless he is in, or is about to enter, the service of the Crown. It is probable that neither the Isle of Man nor the Channel Islands are part of the United Kingdom within the meaning of the Act, and that residence in one of them does therefore not count as part of the qualifying period of five years.

Naturalisation under the Act is conferred by the certificate of a Secretary of State, which does not take effect until the oath of allegiance has been taken. The Secretary of State has absolute discretion to grant or refuse a certificate, and is not bound to give any reason for his decision.

By s. 10 (5), when the father or the mother being a widow has become naturalised in the United Kingdom, every child who has during infancy become resident with the parent in any part of the United Kingdom is deemed to be a naturalised British subject. The rule is, therefore, not the same as that which the Act has created in the converse case of a British parent becoming naturalised abroad. In that case, by s. 10 (3), the naturalisation of the parent deprives the child of his British nationality when the latter has during infancy become resident in the foreign country —*i.e.* not necessarily resident with the parent. But he only loses his British nationality when by reason of his residence in the foreign country he becomes naturalised there.

The language of s. 10 (5) is perfectly general, and therefore it seems that every child of a naturalised British subject becomes a naturalised subject by residing at any time during infancy with the parent in the kingdom. Thus, when a naturalised subject has a child born to him in a foreign country, the child is no doubt an alien, but by becoming resident

with the parent in the kingdom, on this construction of s. 10 (5) he becomes naturalised. If this be not the proper construction, the Act is obviously defective in this respect.

The Naturalisation Act, 1895, has amended s. 10 (5) by providing that the residence of a child of a naturalised British subject with his father, while in the service of the Crown abroad, has the same effect to naturalise the child as residence with him in the United Kingdom. As the mother is not mentioned, residence with a widowed mother in the service of the Crown out of the United Kingdom does not naturalise the child.

The general enactment as to the status of a married woman (s. 10 [1]) shows that the naturalisation of the husband affects that of the wife, whether she resides with him or not.

As s. 6 provides that any British subject who, when in a foreign State and not under any disability, voluntarily becomes naturalised there ceases to be a British subject, this provision applies to a naturalised British subject who becomes naturalised elsewhere. There is in s. 3 another provision by which a naturalised British subject can divest himself in certain cases of his British character without becoming naturalised abroad. For this purpose (1) a convention must have been made between the Crown and the State of which he was previously a subject allowing him to renounce British nationality, and (2) he must make declaration of alienage.

The Naturalisation Act is silent as to the status of an alien woman who has married a British subject after his death or the dissolution of the marriage by divorce. It merely states, as we have seen (s. 10 [1]) that a married woman shall be deemed to be a subject of the State of which her husband is a subject. The Act declares that a natural-born British subject, who has become an alien in consequence of her marriage, remains an alien after her husband's death (s. 10 [2]). It may be argued that this express declaration shows that s. 10 (1) by itself was not considered to change the wife's national status permanently. On the whole, however, it seems that as the Act contains no clause which expressly deprives a widow of the status of a naturalised British subject, she does not lose that status; but the point is not free from doubt. The result, if this be not the correct view, would be that if the foreign widow be resident in the United Kingdom after her British husband's death, she would usually have no nationality whatever; for the laws of most foreign States do not allow a female subject who has lost her national status by marriage to resume it unless she be resident in their dominions.

The Italian Civil Code says specifically (Art. 9) that the foreign wife of an Italian subject retains Italian nationality during her widowhood.

Colonial Naturalisation.—The right of the Colonies and other British possessions to legislate with respect to naturalisation is recognised by the Naturalisation Act. S. 16 declares that

All Laws, Statutes, and Ordinances which may be duly made by the legislature

of any British possession for imparting to any person the privileges, or any of the privileges, of naturalisation, to be enjoyed by such person within the limits of such possession, shall within such limits have the authority of law.

The Act does not recognise that naturalisation in any colony gives the status of a British subject out of the territory of the colony; and therefore if a person naturalised in a colony takes up his residence in the United Kingdom, he must remain an alien in the eye of the law for five years, even if he have enjoyed the rights of a British subject in the colony for fifty.

In the various colonies different views have naturally prevailed as to the facilities which ought to be given to aliens to obtain naturalisation. The desire to attract immigrants is of course not equally strong in all, the quality of the alien population may differ greatly. Consequently the Colonial laws show a great diversity as to the conditions under which naturalisation is granted. In some colonies no definite period of residence is required—e.g. in New Zealand and Cape Colony. In South Australia a residence of only six months is exacted. Further, although the absence of a probationary period really makes the provision unnecessary, the laws of these three colonies enact that previous naturalisation ("elsewhere," Cape of Good Hope, Act No. 2 of 1883, ss. 4, 5; "in another colony," South Australia, Act No. 5 of 1864, s. 11; "in the United Kingdom or another colony," New Zealand, Act No. 10 of 1880, s. 7) may be recognised as effective in the colony. A fact worth noticing is that in 1896 the Legislature of New Zealand passed a law prohibiting the naturalisation of Chinese settlers.

Although naturalisation in a colony has according to law no effect or status out of the colony, the person naturalised is not refused the protection of the Crown in foreign countries. The passport which is given to him differs, however, in form from the ordinary Foreign Office passport, in that it only describes him as naturalised in a certain colony.

One result of the limited effect given to Colonial naturalisation, pointed out by Mr. Hall, is that in Oriental countries the naturalised person has no right as a British subject to the protection of the consular jurisdiction. The grievance is, however, more apparent than real; for he may be given the same advantage by being made a protected person.

Naturalisation is in this country regarded as a privilege, to be neither churlishly withheld nor indiscriminately granted. In the present state of Colonial legislation it may not be advisable to allow naturalisation in any colony to give the status of a British subject in the United Kingdom; but it seems to me that the law would be greatly improved if the Secretary of State had a discretionary power to give a certificate of naturalisation at once to an alien who has been naturalised in a colony and has taken up his abode in the United Kingdom. Residence in a colony might also be allowed to count as part of the qualifying period of five years; but such a concession would not be without its dangers. Enquiries as to the antecedents of the applicant

could not be made so easily as when he had resided in the United Kingdom.

A more satisfactory alteration of the law could be effected by a scheme which has been suggested under the title of Imperial Naturalisation. This scheme would allow the Colonies as heretofore to grant naturalisation within their limits on such terms as they think fit. At the same time it would create a new kind of naturalisation, to be obtained in every part of the Empire on compliance with certain uniform conditions, the same in substance as are required in the United Kingdom. The naturalisation obtained under this scheme, truly called Imperial Naturalisation, would confer the status of a British subject in every part of the Empire.

MOHAMMEDAN LAW IN INDIA: ITS ORIGIN AND GROWTH.

[Contributed by SIR RAYMOND WEST, K.C.I.E.]

Historical Basis of the Administration of Mohammedan Law in British India.—By Warren Hastings' famous "Plan" of 1772 a Court of Diwání Adálat, or Civil Judicature, was set up in each Collectorate, presided over by the Collector as Diván of the Emperor. Criminal Courts were established at the same time, in which the decision of the Kázi or Mufti was made subject to the supervision of the Collector. The chief Courts were the Diwání Sadr Adálat, composed of the Governor-General and Council for civil causes, and the Nizámat Sadr Adálat for criminal cases. The latter was presided over by a Darogah Adálat, appointed by the Názim of Bengal, but superintended by the Governor-General and Council, in order to check any violations of natural justice through the advice of the Mohammedan law officers, based on the provisions of their law as to evidence and retaliation. Capital sentences at this stage were sent to the Názim for his fiat.

Under this "Plan" Mohammedans and Hindus were given the benefit of their own laws in suits regarding inheritance, marriage, caste, and other religious usages and institutions. By the Regulating Act, 13 Geo. III., c. 63, the Governor-General and Council were empowered to legislate for Fort William and its dependencies in Bengal, and under this authority, after several intermediate regulations, Impey's Code was promulgated in 1781. By this the functions of the civil Judge were wholly severed from those of the Collector. The law to be administered remained as before; and by the Statute 21 Geo. III., c. 70, s. 21, the superintending Court, the Sadr Diwána Adálat, was made a Court of Record. In 1782 the Governor-General and Council, who had handed over the superintendence of this Court to a single judge,¹ had to resume it under orders from the Court of Directors. In the meantime, by Regulations of 1780 and 1781, it had been enacted that the "Law of the Korán" should be administered to Mohammedans in suits relating to "inheritance and succession, marriage and caste, and other religious usages or institutions." This was repealed by s. 15 of Reg. IV. of the Cornwallis Code of 1793.

In 1784 the Statute 24 Geo. III., c. 25, directed that permanent

¹ *I.e.* to Sir Elijah Impey.

rules should be settled "according to the laws and constitution of India (as to Zamindars, etc.), by which their tributes, rents, and services should be rendered and paid."

With regard to the Supreme Court established at Calcutta under 13 Geo. III., c. 63, it was enacted by 21 Geo. III., c. 70, that suits should, in the case of Mohammedan Daffis, be determined by Mohammedan Law in cases relating to inheritance and also to contracts. Provision was made also for preserving the authority, under Mohammedan Law, of the fathers and masters of families, and for freeing them from criminal liability for acts affecting members of their families consistent with the law of caste. In the subsequent Statutes for establishing Recorders' Courts and Supreme Courts at Madras and Bombay, similar provisions were made, and were fortified by a direction that the rules of the Courts should be framed with due respect to the religious laws and usages of the natives.

The Charters of the present High Courts, under the Statute 24 & 25 Vict., c. 104, preserve to them the jurisdiction previously exercised by the Supreme Courts. The Statute 24 & 25 Vict., c. 67, gives to the Governor-General in Council full power of legislation for British India; and in the exercise of this power, and of that simultaneously conferred on the local councils, the Hindu and Mohammedan Laws have been maintained or declared operative in the several provinces of India, with certain variations of expression, as noted in my introductory lecture on Hindu Law. The variations consist generally in the greater or less weight allowed to local custom in competition with the general provisions of the Hindu and Mohammedan Laws. In case of difference the customary law generally prevails; but the precise terms of the jurisdictional laws should be studied as set forth for each province in Sir Roland Wilson's Digest. Rather important breaches have been made by legislation in the Mohammedan Law by Act 21 of 1850, which frees an apostate from forfeiture of his property; and by the Contract Act 9 of 1872, which applies to transactions, in many cases, rules differing from those of the Mohammedan Law. Majority is fixed by Act 9 of 1875, at an age (18) different from that fixed by the Mohammedan Law. The duties of guardians are defined and modified by Act 8 of 1890, but without radical alteration of their relation to their wards and the estate. The extent to which the Probate and Administration Act operates on executors who do and who do not obtain probate has not been completely settled. The Succession Certificate Act 7 of 1889 greatly enlarges the powers of relatives and persons interested as to the estate of a deceased, if they arm themselves with a certificate. Kázis abolished by Act 11 of 1864 may now be appointed for certain Executive duties under Act 12 of 1880.

Sources of Mohammedan Law.—The sources of the Mohammedan Law are—

- (1) The word of God revealed in the Korán.

- (2) The acts and words of Mohammed.
- (3) A decision of agreement, as to some point mooted, by the companions of Mohammed, their disciples or the pupils of these.
- (4) Inferences from the indications afforded by any of the foregoing drawn by recognised Mujtahids.

The lawyer or judge who is called in to decide a point in a controversy is not at liberty to construe the original sources (1) and (2) according to his own discretion. He is bound by the interpretations, by the rules and jural method, accepted by the school to which he belongs, or to which the party to be affected belongs. He must allow due weight to authoritative treatises of the same school; and in India he must be governed by the decisions on similar points of the Judicial Committee of the Privy Council and the High Courts. The weight due to precedents is fully recognised by the Mohammedan Law; and many collections of precedents exist, especially the *Fatwa-ul-Alamgiri*, compiled by order of the Emperor Aurungzeb. The decisions of the British Courts must be allowed at least equal force, in order to prevent confusion and uncertainty.

The Korán.—The early life of Mohammed is sketched in Sir Roland Wilson's *Introduction to the Study of Mohammedan Law*. I shall purposely avoid the matters which are there treated in detail, and shall call attention to the sources, authorities, and science of the Mohammedan Law as viewed by the Mohammedans themselves, whom it binds as a part of their religion.

The much greater part of the Korán was dictated by Mohammed after his withdrawal to Medina. He used from time to time to fall into an ecstasy, on recovering from which he had a message to dictate which had been brought to him by the Angel Gabriel. Many otherwise insoluble difficulties were thus disposed of. The passages delivered by the Prophet were committed to memory, in some instances reduced to writing, by his disciples. Mohammed himself appears to have exacted scrupulous accuracy in the record of his inspirations. He dismissed Mouavia, it is said, from the office of secretary on account of an erroneous entry, and replaced him by Zaid ibn Thabit, to whom the literary perfection of the Korán is largely due. After Mohammed's death there was an evident danger of the text being lost or corrupted. This was prevented by a careful collation made by Zaid, and a commission of those who knew all or most of the Korán by heart. Great pains were taken with the work. The MS. was handed to the Khalifa Abu Bakr, from whom it passed to Omar, and after him, to his daughter Hafza—a widow of the Prophet. She placed it on her husband's tomb. The Kaliph Othman afterwards made a copy, which he deposited in the great mosque at Damascus, where it remained, until destroyed, along with the mosque, some few years ago, by fire. Two other copies were made from Zaid's MS., and from these all the existing copies of the

Korán have been derived. They are almost absolutely free from variation, except in a few places where the omission of the vowel-points has left an opening for supplying these in different ways, with a consequent difference of sense.

According to Mohammedan belief, the messages delivered to the Prophet by the Angel Gabriel were by him repeated word for word. But his conduct also was equally regulated by Divine control: hence the acts and forbearances preserved by tradition—what Mohammed said, and even what he allowed to be said and done—all afford grounds for inferences of inspiration. As he could not err, his decision on any subject, whether express or implied, has to be received as conclusive and binding as a command of heaven. He did not himself pretend to an exemption from error in judgment and conduct, but the reverence of his disciples soon invested him with a semi-Divine infallibility.

Traditional Authority.—The word “Sunna” (pl. “Sunnat”) signifies manifestation or visible conduct. The casual acts and events even of the Prophet’s domestic life have been made the basis for doctrines of momentous importance. The sayings and doings of Mohammed having a sacred authority were religiously preserved by tradition. It happened, also, that they were greatly multiplied and varied as time went on. After some generations they were reduced to writing by several jurisconsults; and six of the collections thus made are generally accepted as authentic.¹ Of these six, the works of Bukhari and of Hafiz Muslim Nissaburi, as being the most ancient, command the most confidence; yet even these were not compiled until two centuries after Mohammed’s death. Each of them comprises about seven thousand three hundred separate traditions, together with the *isuaad*, or specification, of the links of tradition by which each was traced up to a companion of the Prophet. When at an earlier period the great jurists Abu Hanifa and his successors came on the scene, they generally found a *hadis* ready at hand to support the conclusion on any point in controversy which was conformable to reason and to the ethical system of the Korán. They must have been cheered in their labours by such a *hadis* as this: “When the Most High desires to show favour to one of His slaves, He makes him a lawyer”; or this: “The prayers of a lawyer are mightier against Satan than those of a thousand laymen.” It is certain that Mohammed attached a high importance to the correct administration of justice according to the law, which he regarded as a precious boon of God to man. He stamped a sacro-sanctity upon his legislation, as of Divine ordinance, which in after ages has sometimes proved a stay and sometimes a fetter.

Mohammed’s own Legislation.—Mohammed’s first essay in legislation was in his agreement with the envoys who invited him to Medina. They swore

¹ The Shiah reject the traditions received through the first three Khaliphas. They accept the example of their Twelve Imáms as itself a source of law, not merely as an authentication of the traditions of the Prophet.

on behalf of their fellow-citizens to worship one God, to abstain from theft, infanticide, adultery and fornication, and degrading insults to women. We may learn from this enumeration what forms of immorality were most flagrant, and how great a step Mohammed at once took in advance. After his installation at Medina he organised public and private worship, and established the Zakát, or alms-tribute, as an institution divinely commanded. The contests in which he was engaged necessitated his regulating the disposal of booty and prisoners of war and of conquered and ceded lands. During his ten years of rule he had to decide a multitude of civil disputes. Direct revelation from time to time came to his assistance. Its inspirations are enshrined in the Korán. His actions and words, equally authoritative when clearly established, constitute the Sunnat. From these two sources the whole Mohammedan religious and jural system has been evolved. Just before his death Mohammed recited God's message to himself: "This day I have completed your religion and perfected my favour for you. I am satisfied with you as regards the faith." And in his final address to the assembled believers, after specific exhortations to good living, he concluded: "I have revealed all. I leave you a law which will for ever preserve you from error if you steadfastly adhere to it—a clear and positive law, the book of God, and the example (practice) of His prophet." As all the requisite guidance for human life was declared to be contained within these limits, it would be sacrilege to contradict their contents or to seek illumination from alien sources. Yet the authority of these last words itself rests on oral tradition.

Mohammed's Successors.—The four immediate successors of Mohammed (called Ráshid ad Din¹) followed his example in disposing, as chief judges, of a multitude of litigious cases. Omar, as well as Abu Baku, used to assemble for conference, on such occasions, a council of the faithful, by whom the question was debated with reference to the words and acts of the Prophet as reported by those who remembered them. The *ijmaa*, or concurrence of opinion thus arrived at, became a further fountain of jurisprudence and one of great importance. It was by such means that Omar obtained a ratification of his determination not to distribute all the lands of Syria as spoil to his victorious soldiers, but to leave them in the hands of the Christian occupants, subject to a Kharáj exceeding the tithe payable by Moslems, and dedicated to the uses of Islám.

The practice of obtaining enlightenment as to the law by means of *ijmaa* continued for three generations. The councils were composed of the Prophet's companions, of their disciples, and of the followers of these. At a later stage their moral authority could not be very weighty, and the Prophet himself had said that the "felicitous hour" belonged to these three generations.

¹ The Shiahs regard Ali, the cousin and son-in-law of Mohammed, as his first lawful successor, both as Imám and as Khalípha. After him his posterity. In India the Shiahs prevailed at Bijapur and Golconda, and recently in Oudh.

The councils thus assembled were no doubt influenced in their views by considerations of general utility ; but they did not venture to rest any conclusion on a merely rational basis, much less one opposed to a Koránic text. Thus when exile as well as the bastinado was found too severe a penalty for fornication, a council assembled by Omar relied, for its abrogation, on a direction that the laws should be modified according to the needs of times and circumstances. Had the process of legislation by *ijmaa* continued, this latitudinarian principle might have annulled or reversed the chief behests of the Korán.

Amongst the fiercest early antagonists of Mohammed were the Abu Sofian clan of the Khoresshite tribe, to which his own clan, of the Abu Hashim, belonged. The two clans were hereditary rivals ; and Mohammed's greatest perils, after he had established his ascendancy at Medina, arose from the attacks of his own tribesmen. They were eventually converted, but more perhaps through policy than conviction ; and the accession to power of the first Abu Sufianite, in the person of Mouaviah, was attended with a slackening of religious zeal which continued throughout the rule of the Ommeyad Dynasty. During this period the Mohammedan Law derived much from foreign sources, but in a form which would have tended to disintegrate it as a homogeneous system, had it not been for the subsequent religious reaction, under the Abbasides, representatives of Mohammed's own clan, and the uprising at a critical time of the legislative genius of Abu Hanifa.

The Moslems and Land Tenure.—From the time of the conquest of Syria and Irak, for a century or more the Moslems appear to have paid but little attention to the development of their law on Islamic lines. For the Moslems, it is true, there can be no right except what is right according to revelation ; but then the Ommeyad sovereigns ruling at Damascus especially the first, Mouaviah, had but little of the true Mohammedan spirit. They ruled over a country in which the Roman Law had been completely established, and where indeed there were great schools of law. For the land tenures and the transactions of the Syrian community the meagre legislation of the Arabs afforded almost no rules. The higher civilisation, therefore, in spite of the theoretic rejection by the Mohammedan Law of any foreign ingredient, imposed itself in a great measure on the lower in the field of law, as well as of administration. In the period preceding the rise of the Abbasides—750 A.D.—the Mohammedan Law became infiltrated with many notions, derived from the Civil Law, which it has ever since retained, though mostly in a modified form. For a period of about ninety years there was a complete cessation not only of original legislation, but of theoretic and doctrinal development of Islamic jural principles. The change that was coming over the Moslems in Syria was highly distasteful to the more rigid believers in Arabia, and under the Abbasides there was a considerable reaction towards strictly Mohammedan feeling and principles, governed by

the sacred texts and traditions. The royal fountain of legislation had run dry with the death of the fourth rightly guided Kalipha ; but under Abu Jafar-al-Mansur a new creative energy was manifested, and continued to operate for about a century, but especially for the fifty years or so down to the decease of Harun al Raschid. It took the form of doctrinal exposition, and the seat of superior Moslem legislation has from that time been transferred from the palace to the mosque and law school.

Mohammedan Jurists.—The first and chief agent in this revolution was a man of genius named Abu Hanifa,¹ commonly called by Musalman writers the Imámi Azim. He was a doctor well versed in the Greek learning of his time, as well as in the Korán, and the mixed doctrines derived from it and from alien sources. The task he set himself was that of "Islámising" the jural institutions of the Mohammedans, of founding them on a purely Mohammedan basis. He began by framing a philosophy of jural duties and relations which, however suggested by the actual state of things, and in its conclusions conforming to accepted notions, was logically deduced from the sacred sources, the Korán and the Sunnat. As a means of ascertaining the true scope and significance of these, he made use of the *Ijmaa* and the traditions. Having thus settled the doctrinal and ethical basis, he proceeded, by a free use of *qiyás*, or analogical reasoning, to build up a superstructure of practical law. Every principle, every rule, however minute, was referred directly or remotely to the sacred sources, appreciated by reference to the occasion and circumstances in which they originated. His decisions were generally recorded. From this time forward it has been recognised that, though a true Moslem may submit to a non-Islamic law through constraint, yet no such law has a moral claim on his obedience, nor can he obey it of choice without a risk of eternal perdition. And the sacred law for a Moslem is not the authoritative pronouncement of the prince or the judge, but the exposition given by the *ulama* or recognised jurists-prudents according to the principles of the school to which they belong.

The Mohammedan Law is a particular phase of the Mohammedan religion. Like the other parts of that religion, it is regarded as sacred and supernal. Its sense, in the more abstruse and complex cases, has to be accepted from certain recognised *mujtahids* as expositors. These differ for the different sects amongst the Sunnis ; but the adherents of one of the principal sects is bound by the doctrine and jural method of its founder. After the death of Hanbal, A.D. 856,² the *ijtahid*—i.e., the intense meditative energy by which the four great *mujtahids* became virtual legislators—ceased, or at least ceased to be recognised as creative and authoritative.³ Subsequent doctors of perhaps equal ability conceived the idea of founding new schools ;

¹ Born A.D. 699 ; died A.D. 767.

² A.H. 241.

³ *Mujtahids* are of three classes. Those of Class I cannot be questioned. See Morley I., *Introd.* 238.

but finding this impracticable, they were able to cover the failure of their projects by supposed intimations of the divine disapproval of any additions to the legal edifice, save in the way of elaboration of the plans already outlined. Within this boundary, as defined by the founder, and in accordance with his system, the Mohammedan jurist has a discretion in dealing with new cases as they arise analogous to that exercised by the judges in England. The difference between the two is this, that the judgment of the English Law Court becomes itself a part of the national legislation, while amongst the Mohammedans no extension or modification of principles is allowed beyond the point reached by the great masters. The original sources may be used according to a mufti's ability,¹ but for the method pursued by him in any solution of a legal problem, he must rest on a principle or a precedent approved by a master—i.e. a *mujtahid* of the first or second class.

It was inevitable that in such conferences as those of the *ijmai umat*, convened by the early Khaliphas, there should frequently be a dialectic treatment of indications primarily pointing different ways. It was equally inevitable, where no text or example precisely in point could be found, that the *ijmaa* should be framed according to some analogy. This involved an application of reasoning which, limited to the original sacred materials, subsequent jurists of the Hanafi school thought equally open to themselves. Thus brandy was pronounced a forbidden beverage by analogy to wine, the use of which was prohibited by Mohammed. The Prophet himself had approved of the *ijtihad*, or constructive effort, by which one of his officers said he proposed to deal with cases for which there was no rule provided. Abu Hanifa therefore had a good precedent for the application of *qiyās* to the many cases really unprovided for in the meagre legislation of the Korán. The danger attending this process was that of so rationalising the law, that it would eventually be brought into discord with the Korán and the Sunnat, or at least stand quite apart from them.

Abu Yusuf, the first eminent disciple of Abu Hanifa, showed a tendency to explain away the narrower texts, or to ignore them; but the puritan reaction was meanwhile gathering force in Arabia. Malik and Shafi put a curb on ratiocination as a source of law. Their schools abjured the plastic liberality of the Hanafis. Hanbal was a hide-bound reactionary who reproached himself for having ever departed a hair's breadth from the sacred texts. The wide acceptance of such teachings reacted even on the Hanafi school, and checked a development which in the ninth century had placed the Mohammedan Law, in many ways, far in advance of the Christian laws of the same time.

Abu Hanifa, though so great as a lawyer, wrote but little. His work might have perished with him, but for his having disciples of a merit inferior only to his own. Two of them, Abu Yusuf and Abu Mohammed,

¹ Sir Morley I., Introd. 240.

are constantly cited along with him as the greatest authorities on Mohammedan Law. The former was raised by Al-Mansur to the dignity of Qazi al quzát. He first reduced the special doctrines of his master to a methodical and popular form, in which they were diffused over the Mohammedan world. He wrote also a fundamental treatise on the Kharáj, and he is supposed to have collaborated in some of the works of his fellow-disciple Abu Mohammed. The latter may be regarded as the editor, if not the author, of the Sunni Mohammedan Corpus Juris. He was the friend and companion of the Khalipha Harun al Raschid. He composed the "Great Collection" and the "Small Collection," the former containing a full discussion of 1528 legal questions pronounced on by Abu Hanifa, and the latter a summary. To these he added a supplement. In a third work, called the *Mabsut*, he analysed the theory of the law as conceived by his school, and illustrated it by practical applications. This was followed by a treatise on the law of war, and the disposal of conquered territory. He compiled the laws and regulations framed by Harun al Raschid, with his aid, for the government of several conquered provinces. An estrangement having grown up between Yusuf and Mohammed, the doctrines of the two afterwards diverged on some points to a serious extent. When that is found to be the case the decision rests with Abu Hanifa wherever his opinion can be ascertained. When the two disciples concur they are allowed to balance or even outweigh their master.

The edifice raised by Abu Hanifa and his disciples has been extended by their successors, but never substantially changed. Their authority, even that of the disciples, is so great that they are deemed *mujtahidini bi cheri*—i.e. jurisconsults in legislation. No one in after ages has been allowed by their school to be a mujtahid of the first rank. This is the school which has prevailed amongst the Sunnis of India and of Turkey; and its doctrines are, therefore, those which most call for our close study. The heads of the other three great Sunni schools, recognised also as mujtahids of the first rank, are the Imami Malik, who died in A.H. 179,¹ the Imami Shafi, deceased A.H. 204,² and Hanbal, who died A.H. 241.³ Malik's doctrines are received along the north coast of Africa. Shafi's tenets have gained some acceptance in India, as well as in Arabia and Egypt; and in Kurdistan and Java they are dominant, as well as on the Persian frontier of Turkey. Shafi was a pupil of the Imami Mohammed, as the latter was himself for a time of Imami Malik. Hanbal's peculiarity was a rigid literal interpretation of the texts, as if by a reaction from the teaching of Yusuf. His system prevails in Morocco and partly in Algiers. It has adherents in Java also, but virtually none in India or Turkey. The four founders of schools are in substantial agreement as to the fundamentals of their faith and law; but there are some material differences among them both as to religious practices

¹ Born A.D. 713, died A.D. 795.

³ Born A.D. 780, died A.D. 855.

² Born A.D. 767, died A.D. 819.

and as to the rules of judicial decision. Shafi alone of the three later Imámis manifests any pronounced opposition to Abu Hanifa. The views of all four are embodied in Codes, the authority of which, however, rests entirely on the reputation of the founders of the schools.

The authority gained by the great mujtahids for learned lawyers as such gave weight and importance to a whole library of law books written in after times. These writings have been classed as

- (1) Notes on the Korán.
- (2) Anecdotes of the Prophet.
- (3) Collections of the "Responso Prudentam."
- (4) Treatises on the theory of the Law.
- (5) Treatises on the practical application of the Law.

Of Class (1) there are six works of commanding importance. The *Kashshaf* and the *Anwár at Tanzil* are of the first authority. One of the most respected by the Hanafis is that of Abu Mansur al Maturidi.

The collections of Hadis in Class (2) are very numerous. There are six great Sahibs or collections of Sunnat. The one by Al Bukhari, who died A.H. 256, is the most esteemed. It contains 7395 authenticated traditions. Another great collection is that called the *Sahib Muslim*, by Muslim, who died A.H. 261, A.D. 874.

The collections of fatáwa, or opinions on litigious cases, forming Class 3 are pretty numerous, but only those of comparatively modern date are now much referred to, as these alone bear on cases arising in actual practice. The *Fatáwa al Alangiri* is one of the greatest and most esteemed of these compilations. It was prepared by a commission appointed by the Emperor Aurungzeb, and is esteemed as much in Turkey as in India. An earlier work much quoted is the *Fatáwa Kazi Khan*.

There is an idea pretty widely entertained that the "door of effort in legislation" was closed (*i.e.* that the quasi inspiration through which sound jural doctrines could be produced, ceased) about the time of Abd ul Rahiman in Spain (A.D. 912—961). All that is clear is that at this time the Imami Gazáli abandoned his intention to found a new school, and that Abdullah ibn Massud, who died A.H. 747,¹ gave up a similar project in obedience to an intimation conveyed to him in a dream. But on the lines traced by the four great mujtahids there has never been a cessation of the delivery of opinions dealing with cases as they arose.

The theory of the law is by Moslem lawyers considered a matter of great importance, and accordingly there are many works of Class (4).² The Shafeitos claim for their founder the credit of having first treated the theory of the law in a systematic way; but Abu Hanifa preceded him at least in oral teaching. He wrote too a work on the Metaphysics of Theology, a subject closely connected with Law in the Mohamamedan system. The

¹ A.D. 1347.

² The Shiahns have been hardly less prolific than the Sunnis in works of this class.

establishment of the Islamic foundations was an object with all the great mujtahids; and there is evidence that Abu Yusuf, A.D. 731-98, wrote a treatise on "Usul," though it is not preserved, as well as a practical work on the duties of Kazi. Abu Hanifa's philosophic method is constantly followed in the voluminous writings of his other disciple, Abu Mohammed.¹ The most famous treatise of this class is the *Fahr al Islam*, or "Splendour of Islam," by Pezdavi, who died A.H. 481. In recent times the study of the "Usul" has been rather neglected by Mohammedan lawyers, though very necessary in order that the new rules required by change of circumstances should be moulded into harmony with the general Mohammedan system.

(5) The first great works of the fifth class are the *Jami ul Kabir*, and an abridgment called the *Jami ul Sagir* of the Imam Mohamed. These are based on the responses given by Abu Hanifa, and are of the highest authority. The *Mukhtasar al Kuduri* is so esteemed as to be commonly cited as "Al Kitab," = The book (Al Kuduri died A.D. 1036). It is the basis of the popular work called the *Hidayah*. The great modern work called the *Multaqa al Abhar*, or "Confluence of the Seas" (A.D. 1549) was compiled chiefly from the *Vigaya*, written by Taju Sharia, and commented by Sadir Sharia in the fourteenth century A.D., and three other similar treatises. But the author made use also of the *Hidaya* ("Way of Salvation") of Barhanudin al Marginani, so called from his birthplace, Marginán in Fargána. This author died in A.H. 593.² His work is much relied on in India. There are several commentaries on it, especially the *Kifaya*, A.D. 1346; and a translation of it, through the Persian, was made by Hamilton under the direction of Warren Hastings.³ The *Multaqa* frequently cites also the *Mukhtassar* ("Abridgment") of Abu Hasan Ahmad Quduri, already referred to. The *Multaqa al Abhar* was condensed, rearranged, and translated by D'Ohsson in his "Tableau de l'Empire Ottoman." Its author was Ibrahim Halebi, who died A.H. 956 (circa 1550). A great modern work on the Applied Law (*Furu*) is the *Rad ul Mukhtar* ("Choice Pearl") of Ibu Abadin, who died A.H. 1298 (circa 1881). This is in the form of a commentary on a work of about a century earlier, and affords a good picture of the most recent practical developments of the Mohammedan Law. For fundamental principles it goes back to the works of Imami Mohammed.⁴ In the other Sunni schools recourse is had by all later lawyers to the doctrines of Malik, Shafi, and Hanbal. In the philosophy of the law no innovation is tolerated on the principles laid down by the four great masters, though within the outlines traced by them a complete freedom is allowed to Mohammedan jurists in the way of deduction, comparison, and analogical reasoning.

As the Chief Kazis and Muftis of a Mohammedan realm must be

¹ A.D. 749-802.

² A.D. 1196.

³ The subject of Inheritance is unfortunately omitted.

⁴ On the doctrine of Inheritance the leading authority is the *Sirajiyah*. The chief commentary is the *Sharifiyah* (A.D. 1411). These were translated by Sir W. Jones.

appointed by the sovereign, it has until lately been easy for a Sultan or a Great Moghal to man the highest posts in the religious hierarchy so as to obtain a sacred sanction for his own policy and his excesses. It was a common thing in former days to banish a Chief Mufti from Constantinople ; and Akbar in India condescended to oppress a recalcitrant ulema. The consequence was that the fountains of justice were corrupted, and the ruler was set free from the only restraint that he was bound to recognise. In the early part of the last century the Sultan could obtain from the Chief Mufti an opinion that it was lawful to exterminate Shias, and that a peace concluded with them might be broken at the first convenient moment. In Oudh the appointment of a Shia Chief Kazi was the sign and the means of a general conversion of the people from the Sunni to the Shia faith professed by the King.

The Mohammedan philosophy divides things knowable under the heads of sciences of reason and sciences of revelation.¹ Law belongs to the latter class. The sciences of revelation are sciences of the sources or of the derivatives. The science of the sources deals with the Korán, including its language, and the Hadis or traditions. The sciences of the derivatives comprise theology and law, which latter is subdivided into theory (*usuli-fiqh*), and applications (*furu*). Applied law deals with the relations of living persons either to others or to persons deceased. The former embrace all transactions, the latter inheritance. There is, moreover, a group of human actions, such as prayer, fasting, alms, pilgrimage, and holy war, which are regarded as of legal obligation, and as admitting enforcement by mundane sanctions, like the duties commonly enforced by law under the Christian systems. A great part of the Moslem social and political structure is built upon the recognition of pious duties as proper to be insisted on by the sovereign. Thus the fiscal system rests in a great measure on the duty of almsgiving and the tithe ; and the *jihad*, or holy war, when commanded, is a political institution of the first importance, enforced at need by an earthly, as well as by the strongest religious sanction.² Austin's theory of the law as a general command of a human superior does not square with Moslem notions. According to them, jural obligation rests on the will of God, manifested directly or indirectly by revelation. The command of the sovereign is binding because, and in so far as, it gives effect to God's will ; if it contravenes God's will, as declared in the Sharan, it is to be resisted. "Obey me as I shall obey the Lord and His apostle !" So exclaimed Abu Bakr when elected Kaliph ; and the sacred law has always been held supreme, even over the sovereign, whom otherwise it makes absolute.

¹ Morley I., Introd. 246.

² The public taxes are classed as "*hukuki shariyé*" and "*rusm*"—*i.e.* lawful changes and administrative cesses, besides which there are always "*aváni*" or exactions. The capitation, *Kharáj*, and *usuri* are all, as "*hukuki*," included sometimes in the term "*Kharáj*."

The reception of any one of the great creeds of mankind has always profoundly affected the moral character of its disciples. The new stand-points taken up for viewing the relations of man to man, as well as of man to God, have thus in every instance greatly modified the material conditions of human existence. New duties and obligations becoming recognised, along with new prospects and hopes, have led to material changes in the balance of motives, in the habits and the social organisation of those subjected to the new spiritual influence which dwarfs all others. Thus in the sphere of law the triumph of Christianity, without directly subverting the Roman law, infiltrated it with principles which made the Code of Justinian widely different in spirit and total effect from the Institutes of Gaius. The family, the social structure, were de-Romanised and reformed on a Christian basis of natural relations and Christian benevolence. Yet Christ disavowed any mission as a political reformer, as a lawyer or judge. It was only through the quiet but complete change of the moral basis of some, the most important, of human relations that the law was drawn by an irresistible force into a general conformity with the new and nobler faith. In the great departments of public law, proprietary rights, inheritance, and contracts, Christianity left the whole field open as before to the operation of principles based simply on reason and a sense of general utility. Meanwhile the Christian family relations, loyalty, truth, and honesty in transactions, have been surrounded with sacred sanctions, developed at some points into legal safeguards.

Islamism aimed from the first and in the largest sense at being a universal and a missionary religion. It paid respect to the Mosaic institutions and to the Christian morality; but it aimed at constituting a universal society on a new basis of revelation. This may not perhaps have been a clearly conceived purpose of Mohammed, but it almost immediately became that of his successors. It regards every truth of science, philosophy, and administration as embraced within religious truth, and subject to sound religious dogma. It endeavours to provide for the whole scheme of human relations; and so includes a complete system of law, at least in outline. Within this are embraced many duties, such as almsgiving, which Christian legislation leaves to be enforced only by the social or the moral sanction; and the strictly legal duties are enumerated and enforced with a detail which, regard being had to the sacred character of the law, makes expansion and adaptation in some cases extremely difficult. Thus the prohibition against taking interest on loans has created endless embarrassment in the field of commercial law. No ingenuity has sufficed quite to evade it; and as the making of profits on transactions is approved, many subtle distinctions have had to be invented to keep such profits in cases of credit dealings out of the forbidden category. The business of banking is one that a conscientious Musalman can hardly pursue, nor can he keep a reserve of money available for occasions of profitable use without losing such gain

as a Hindu or Christian would make in the meantime. The disadvantage thus caused has been most injurious to Mohammedans as merchants: as capitalists they hardly exist; the machinery of credit in Mahommedan countries is almost wholly in the hands of aliens, with conspicuously evil results. The long-continued inculcation of an unsound economic principle, under the guise of a religious precept, and the habits and practices induced by it, have gradually affected even the capacity of Mohammedans for money dealings; and they are everywhere the prey of infidel usurers and of traders unhampered in the use of their capital and their financial traditions, connections, and abilities. Suleiman the Great, in his "Kanun nâme," allowed interest up to 11 per cent. to be taken, as he also alleviated the punishment prescribed by the Shariya for many offences. But the Shariya nevertheless remained, and the interpretation of it could not be altered by a human decree. Thus it is that in Turkey the Greeks and Armenians thrive, while they are detested, and sometimes massacred, as at an earlier time the Jews were in England. The Mohammedan faith, wherever it has been fully received, has, partly because of its simplicity, partly because of its minute regulation of conduct, exercised a powerfully plastic influence over the believers. The original national type of character has been supplanted to a great extent by a specially Mohammedan character; and every Sunni Moslem is, in feeling and turn of mind, a compatriot of every other. He hears the same texts, utters the same prayers in the same ways, admires the same patterns of conduct, and thus by degrees become subjected to the domination of a common moral alchemy.

The centrifugal dispersive character of the Mohammedan laws of the family, and of inheritance, affords another striking instance of the powerful effect of a religious system on the social and political organisation, and on the economic condition, of a community. Four wives are allowed to the orthodox believer: he may legitimise his offspring by his house-slaves. All the sons stand on a footing of perfect equality; it is only the father's preference that can give any one precedence, even in a succession to the throne. Hence the slaughter of brothers as a necessary security for a newly-installed sultan, a process facilitated by the absolute power assigned by the law to the head of the state so long as he supports the *shariat* or sacred ordinances and conforms to them.¹ Political progress, even political stability, is hardly possible under such a system.

Amongst the great men of a lower grade the necessary splitting up of the patrimony at each descent so as to give their prescribed aliquot portions to a number of heirs, co-operates with other causes to produce recurring poverty, and to prevent the growth, in any Mohammedan country, of a territorial aristocracy, which might serve as a bulwark against the sovereign's tyranny.

¹ Mohammed II. cites in his "Kanun-name" the opinion of the Ulema that the Sultan might lawfully murder his brothers, and adds "Let my descendants fare accordingly."—Finlay, *History of Greece*, v. 32.

The land in a conquered country once made *waqf*, or quasi-*waqf*, and dedicated to the uses of charity and the support of Islām, may indeed be assigned, by way of fief or *jaghir*, for the maintenance of pious or public services; but any such alienation is in principle specific and temporary. Where the soil has once been suffered to remain in the hands of the conquered, subject to the "*Kharāj*," it retains that character ever afterwards, even when transferred to a Moslem,¹ and when the cause for a temporary alienation of such lands, or, rather, of the State's *Kharāj*—*i.e.*, the land-tax to an individual—ceases, the estate may be resumed. Hence the apparent confiscation, often noted by travellers, of a nobleman's estate on his death. It was, in fact, an estate on conditions, and only for his life; and all it produced was affected with an obligation, requiring it to be expended for the designated purpose,² though on the feudatory's death it was usual for the sovereign to allow a partial enjoyment of his emoluments to his family for one or two generations. This resumption was so frequent that it became a pattern, it may be feared, in some cases, for others in which an estate which was really property was taken by the sovereign at the owner's death; and then for a claim of the sovereign as the universal heir of landholders. Such confiscations had no ground in the Mohammedan Law, and they were never practised, save in pure caprice, in the case of estates left by traders and agriculturists; but the fear of them was enough to make landed property precarious, as a needy or greedy monarch or satrap might at any time find an excuse for plunder.

The Mohammedan annals are indeed full of instances of vazirs and other great officers growing rich by malversation, dying by violence, and leaving a family that, through confiscation, sinks into penury and obscurity as suddenly almost as the deceased had emerged from it. Some prudent upstarts endeavoured to provide for their descendants by putting their estates into "*waqf*," with a trust for the family; but as a settlor could

¹ Confiscated and waste lands belong to the State Domain. Like those left to the former infidel proprietors, they are subjected to a *Kharāj*, but without a recognised right of ownership in the occupant.

² Amongst the Seljuk Turks hereditary fiefs appear to have been established very early. Many of these were continued by the Ottomans. Murād I. first made the hereditary military fief a regular Mohammedan institution, but still each transmission of the fief required a renewal of the grant from the Sultan. Suleiman the Magnificent legislated against unauthorised recognitions and partitions of these benefices. He was aided by the great Mufti Abu Sund, and on his death the farmāns and fatāweh were collected by Mohammedans Chalabi in a *Kanun-name*. From this it appears that the ordinary military grantee took the State's fiscal rights but for his life, in return for military services. He took the customary rent and cesses from the raiyats, frequently a tax in kind out of the lands included in his grant, in order to pay the charges of his office. In India an hereditary fief was hardly recognised. The holders of ancient chiefdoms in many cases accepted re-grants of them, on terms of giving a large portion of the revenues to the Mohammedan conqueror. They thus become tributary zamindars. The holder of a *timor* (*tumar*) or pecuniary grant however valuable, did not become a proprietor of the soil or even of the revenue.

thus dispose of property only in so far as it was really his own, his purpose could usually be defeated. An independent legal opinion could hardly be obtained against the Crown, owing to the dependence of the Kazis and muftis, except where some cardinal point of faith was concerned.

In Turkey the Ulema, under the regulations framed by Mohammed II., and by Suleiman the Great, were organised into a very powerful body, teaching both theology and law—law as a part of religion. They enjoyed two great privileges—freedom from taxation, and unquestioned succession. Thus, as Von Hammer points out (Bk. xxxv.), they are the sole hereditary aristocracy of the country, as in their families alone can fortunes be accumulated and transmitted without ruin from fiscal and official rapacity. No such organisation of the learned was ever, apparently, arrived at in India. The head mufti and the Kazi ul Kázíat had to rely on their own reputation, and the reverence felt for their offices, in order to give effect to their fatáwah and decisions. The Ulema as a class never rose to great importance or wielded the formidable power exercised by them in Turkey. The sovereign in case of need could rely on Hindu numbers against Moslem fanaticism. With a little skill in statecraft he made both subservient to his own purposes.

The ordinary raiyat's position throughout the greater part of the Mohammedan territories was that of an occupant subject to the Kharáj imprescriptibly annexed to his holding, without the ownership which might be conceded to the conquered, subject to Kharáj and Jiziyat, but as a tenant by sufferance of the Crown, with a right ripening by time and use into a kind of possessory title. The provincial and local authorities had no right to exact more than a reasonable land-tax. An appeal lay to the sovereign if they exacted too much. Such was the theory, but in practice the limit of exaction was generally the raiyat's ability to pay, especially in India, after the farming system had been established, and Zamindars, hereditary or non-hereditary, subject themselves to arbitrary demand, were allowed to recoup themselves at the cost of the peasants.¹ Under this system, when a raiyat died, his holding fell into the domain of the State, though the usufruct would be continued to his son. If he was driven away by war or oppression, or through poverty could not cultivate his holding, in these cases too it lapsed to the State. The Mohammedan Law abhors "dead land," and if the holder of arable land does not till it, an outsider may do so. The government share of the crop is thus made available, and the intruder in return is secured in temporary possession. The joint and superior interest of the State (of Islám) cannot be displaced, and in the common case of a lapse it becomes sole ownership. Thus it was that at the time when British ascendancy was established, government was the almost universal landlord of a great part of India. Private property in

¹ The position of the Bengal raiyat was by such means assimilated to that of the Egyptian fellah towards the multezim.

land could, and did, subsist in many cases, and the Mohammedan law afforded no warrant for its confiscation ; but the land that could be reduced to private ownership and the means of acquiring it were very limited. Thus, too, it was that the crown lands in Turkey, at the meridian of Ottoman splendour, yielded about three-fourths of the whole revenue of the State (see Von Hammer, Bk. xxxv., vol. 6, pp. 260, 267). The soil had in most cases become forfeit by conquest, and had not been distinctly restored to private ownership subject to Kharāj. It had become domain of the State, with usufructuary rights in the occupants ripening, according to time and place, into a possessory title, subject to variable taxes, and to a free exercise of the eminent domain of government.

The general narrowness and inflexibility of the Mohammedan Law in refusing recognition to any rights and relations except such as are based on its own provisions, and therefore on the Mohammedan religion, is qualified, in practice, by the rule that questions of personal status, and those relating to the clergy of a tolerated religion, are to be governed by the religious laws of the particular community. The analogy of the Mohammedan Law itself is followed as to principle, while its particular rules are dropped. Mohammed himself directed that protected subjects should be conceded what belonged to their religion ; and the law of personal status, as viewed by Moslems, falls peculiarly within this category. So, too, do the regulation of worship, and the relations between clergy and laity. Hence it was that the Sultan and the Great Moghul readily allowed the Christian bodies in their dominions their own laws as to marriage and inheritance. They went further, and allowed them to settle all civil disputes amongst themselves by their own laws and their own tribunals.¹ A similar indulgence was allowed to the Hindus in India. But once a case fell within the scope of the public law, or had to be adjudged by a Mohammedan tribunal, as always where a Mohammedan was a party, no other law was applied, or could be applied, than that which alone the Mohammedan holds binding and superior to all merely rational considerations.

In order to avoid injustice arising from this source, the several Christian Powers obtained from the Sultan of Turkey concessions called Capitulations, under which the Consular jurisdiction over their own subjects was recognised, and a right was secured of presence on the part of a Consular official at every trial by an indigenous court of a case in which a subject of the Christian State was sued or prosecuted. In recent years the Mixed Tribunals in Egypt have been set up, with cognisance of all suits between Europeans

¹ The Sultans from the time of the capture of Constantinople always used the Patriarch as an instrument of government. In the earlier times of their dominion they left much of the local administration to the Christian villagers. In India the village institutions were hardly touched by them until fiscal derangement there, as in Turkey, led to encroachments and oppressions, especially through the farming system, which caused a general disintegration.

and natives, and between Europeans of different nationalities. Codes of law have at the same time been promulgated in Turkey and Egypt based chiefly on the Code Napoléon, for the purpose of assimilating the penal law and the commercial law to those of Christian countries. These are quite different from the Kanun-name of Orkhan, Mohammed II. or Suleiman the Legislator, which was a system of administrative ordinances supplemented by penal regulations. They purport to place all subjects of the Sultan on a footing of equality as to civil rights, enforced by a set of secular tribunals (*mehkemes*). As the Kazis of the old school, bound to administer the *Sharaa* as interpreted by the Ulama, could not be entrusted with jurisdiction under these new laws, a separate set of Courts has been set up in each country, the procedure of which is regulated by codes likewise derived chiefly from the French. Such Mohammedans as recognise the Prophet's suggestion that new laws should be made by meditative effort, to meet new exigencies, accept the new Courts, and the modern law they administer, as having a moral as well as a legislative claim to their obedience. The Ulama look askance on these innovations. The circle of the law, they hold, was completely drawn by Mohammed : he declared that his precepts and example were enough for human guidance ; any contradiction of these involves sacrilege, and no supplement can be necessary. They admit only that many principles merely indicated are susceptible of development on truly Islamic lines. Such development, they say, they would welcome. Mere interpolations from alien systems deserve in their view only the respect due to a rule of force.

MARTIAL LAW IN REBELLION.

[Contributed by G. G. PHILLIMORE, ESQ.]

THE fact of the proclamation of Martial Law in certain districts of Cape Colony and Natal in connection with the present war in South Africa may be thought enough to justify a brief consideration of the nature, meaning, and effect of Martial Law when proclaimed in any part of the British dominions.

Original Meaning.—The term Martial Law originally was spelt "Marshal Law," and meant the law administered in the Court of the Marshal and the Constable of England, described as "the fountain of martial law" by Coke, which was recognised by statute as early as the reign of Richard II. (end of fourteenth century), and practically ceased to exist under Henry VIII., when the office of Constable fell vacant, and was never afterwards except temporarily filled. The Act 13 Ric. II. 2 (A.D. 1389) thus describes the Court's jurisdiction:—

"To the Constable it appertaineth to have conusance of contracts and deeds of arms and of war out of the realm, and also of things that touch war within the realm which cannot be determined or discussed by the Common Law, with other usages and customs to the same matters pertaining which the other Constables have heretofore duly and reasonably used in their time, joining to the same that every plaintiff shall declare plainly in his petition afore that any man be sent for to answer thereto. And if any will complain that any plea be commenced before the Constable and Marshal that might be tried by the law of the land, the same complainant shall have a privy seal of the King without difficulty directed to the said Constable and Marshal to surcease in that plea till it be discussed by the King's Council if that matter ought and of right pertaineth to that Court, or otherwise to be tried by the Common Law of the realm of England, and also that they surcease in the meantime."

Another Act, 1 Hen. IV. 14 (1399), provides that all appeals made of things done out of the realm shall be tried and determined before the Constable and Marshal of England for the time being, and that no appeals shall be pursued in Parliament. Hale (who died in 1676), in his account of the Court's jurisdiction, says that these officers had, as regards matters of war, a judicial power over

"(1) appeals of death or murder committed beyond the sea according to the course of the civil law.

- "(2) the right of prisoners taken in war ; and
- "(3) the offences and miscarriages of soldiers contrary to law or the rules of the army, for always preparatory to actual war the kings of this realm by the advice of the Constable and Marshal, were used to compose a book of rules and orders for the due discipline of their officers and soldiers, together with certain penalties on offenders, and this was called martial law (*Hist. Common Law*, 41).

But it must be a time of war to give exercise to their jurisdiction, for if in time of peace a commission issue to exercise Martial Law, and such commissioners condemn any of the King's subjects not being listed under the military power, this is a great misprision and an erroneous proceeding, and accordingly adjudged in the case of the Earl of Lancaster (*Pleas of Crown* i. 500). The Court proceeded according to its customs and usages, and in cases omitted, according to the Civil Law, *secundum legem armorum* (Coke, *Inst.*, Pt. iv. ch. 17). It sometimes also tried offenders by Martial Law, but only either during or not long after serious rebellion ; and as regards aliens this was not disputed. Thus, when Perkin Warbeck, an alien born in Flanders, was taken prisoner in his invasion of England, it was resolved by the Justices that he could not be punished by the Common Law, but before the Constable and Marshal, who had a special commission to hear and determine the same according to Martial Law, and the sentence of that Court, that he should be drawn, hanged, and quartered, was executed upon him (7 Co. Rep. 6 a) ; and in Mary's reign some of those taken in Wyatt's insurrection were tried without regular process, though their leader had his trial by a jury (Hallam, *Const. Hist.* i. 326). When the Constableship fell into disuse, the jurisdiction of the Court of the Marshal was disputed, but its disciplinary power over the army in time of war was exercised by the Marshal or the general commanding, in virtue of royal commission ; for the Court could be held by commission, and this was not touched by the Petition of Right (Hawkins, *Pleas of Crown* ii. 17). The Crown also claimed the right of executing Martial Law against rebels, but this was only allowed *flagrante bello*. Thus in the case of the Earl of Lancaster, who took part in a rising against Edward II., and on being taken prisoner was tried by Martial Law after the rising was suppressed, and executed at Pontefract, the proceedings were afterwards, on the petition of his son, solemnly reversed by Parliament in the first year of Edward III. as illegal ; and a similar course was taken in the similar case of the Earl of Kent. Under the Tudors the claim to exercise Martial Law was, no doubt illegally, extended by the Crown in various ways. Thus Henry VII. applied it against rebels after the suppression of rebellion ; Edward VI. declared that offences which were Common Law misdemeanours should be punished by it ; and Mary and Elizabeth respectively proclaimed that bringing heretical books into the country, or introducing Roman bulls or traitorous works from abroad, would be dealt with by it. Elizabeth, on the petition of the City of London

during the riots there in 1596, gave a commission to Sir T. Wilford to execute Martial Law on the rioters; but no executions took place under it, and the persons arrested were tried by the ordinary courts; and probably all these proclamations were only *in terrorem*. The Stuarts claimed the exercise of Martial Law for the purposes of putting down rebellion and maintaining discipline in the army: *e.g.*, under James I., in 1624, on the occasion of the return of the army from Spain, a commission was issued to various persons, including the Lord Marshal of the army, military officers, local gentry, and townspeople at Dover, to "proceed within an assigned district according to the justice of martial law against soldiers or other dissolute persons going with them . . . committing any robberies, felonies, mutinies, or other outrages and misdemeanours, which by martial law should be punished by death in such summary course and order as is agreeable to martial law and as is usual in armies in time of war." Articles of War issued in 1625 by the Crown for the discipline of the army till it should be disbanded (which was not till 1628) made specified offences punishable by the commanding officers or the Marshal's Court, and authority was given "to any three or more of the commissioners to call a Marshal Court, and sit in commission to hear, judge, and determine any fact done by soldiers, but to have no power to put to death till they have advertised the general that shall have power of life and death for such troops as he shall command" (Clode, *Mil. Forces of Crown* i. 18); and similar commissions to the above were issued while the army was kept together, the object of which was not merely to support the discipline of the army or navy, but for the more speedy punishment of any crimes committed by offenders in the pay of the Crown and civilians associated with them. In the arguments in Parliament on the right to proclaim Martial Law, which preceded the passing of the Petition of Right, Mr. Rolls said:

"I will not trench upon this power, but upon the abuse of it. The law of the marshal is the king's law, and the common law takes notice of it, and we acknowledge it to be, but now the question is when it is to be used. The common law is the highest for the subject; every liege man inherits the law; it is the inheritance of the king and is not to be taken from him, and martial law is merely for necessity where the common law cannot take place. If the Chancery Courts and Courts of Westminster be shut up, that are the *officina justitie*, it is time of war, but if the Courts be open it is otherwise; yet if war be in any part of the kingdom that the sheriff cannot execute the king's writ there, there is *tempus belli*. If an enemy come into any part where the common law cannot be executed, there may martial law be executed. If a subject be taken in rebellion, if he be not slain at the time of his rebellion he is to be tried after by common law; but if an alien enemy come into the realm he cannot be executed by the common law, for he is not a liege of the king's and so is to be tried by martial."

And Coke said:

"It is time of peace when the Courts of Westminster are open, for when they are open you may have a commission of *oyer* and *terminer*. Where the common

law can determine a thing, the martial law ought not. . . . To hang a man *tempore pacis* is dangerous. I speak not of prosecution against a rebel: he may be slain in rebellion, but if he be taken he cannot be put to death by martial law" (3 Rush. Appendix 79, 80).

In 1628 the Petition of Right (3 Car. I. 1) was passed, which, after reciting the issue of such commissions as that of 1625 above, declared that they shall be revoked and none such ever again issued. In 1639, however, on the occasion of the Northern rising, the Earl Marshal, who commanded the royal forces, was given by his commission authority to execute Martial Law upon mutineers of his own army and the rebels and enemies captured. But in 1640 the lawyers and judges of the Council expressed their opinion that "Martial Law cannot be executed here in England but when an enemy is really near to an army of the King," and the general's execution of a mutineer was illegal. The House of Commons declared the Earl Marshal's Court a grievance; and in order to maintain discipline in the army, proposed that the Crown should issue a commission of *oyer* and *terminer* to the officers in the field and some gentlemen of the country for the trial of members of the King's army in pay. Both Houses were invited by the Crown to confer upon such "a plan to settle the discipline of the army as might not weaken the Petition of Right,"—with what result is unknown. They, however, had a conference as to the disbandment of the army; and the Lords urged that the general should be given power to execute Martial Law for punishing the disorders of soldiers; but the Commons would only agree to ask the King to send down a proclamation that any disobeying the lord-general or their officers should be punished severely as in contempt of the power of King and Parliament (*ibid.* i. 24). However, during the Civil War the Parliamentary army was governed by Articles of War composed by the Earl of Essex, and issued by leave of both Houses in 1642. After the Restoration commissions were issued to generals commanding the forces sent to suppress rebellion (*e.g.* Monmouth's in 1685) empowering them to execute Martial Law on mutineers of their own army and the rebels or enemies captured; and Charles II.'s Articles of War purported to give authority to administer justice to soldiers by Courts-martial, even by sentences of life and limb; but they were only to be in force during the rebellion.

In 1689, the first Mutiny Act, after a recital that "the maintenance of a standing army in time of peace without consent of Parliament is against law, and that no man might be prejudged of life or limb, or subjected to any kind of punishment within this realm by martial law," legalised for the first time the maintenance and discipline of an army in time of peace; and the Mutiny Act of 1702 (1 Anne, 16), and all its successors which continue this state of things, add the words "in peace" after "subjected" above. Thus neither the Petition of Right nor the Mutiny Acts prohibit the use of Martial Law except in time of peace (defined as above): "The particular grievances at which the Petition of Right was

levelled were only the trials under martial law of military persons or of individuals accompanying, or in some manner connected with them" (Lord Brougham, *Demerara Debate, post*).

Accordingly, until 1689 there was no difference between Martial and Military Law, both terms meaning the law applicable to soldiers in time of war; and it is in this sense that the definitions of Martial Law in the authorities of the seventeenth and eighteenth centuries must be taken. Thus Hale speaks of it as—

"in truth and reality not a law, but something indulged rather than allowed as a law. The necessity of good order and discipline in an army is that only which can give these laws countenance, and the indulged law was only to extend to members of the army or to those of the opposite army, and never was so much indulged as intended to be exercised and executed upon others. For others who had not listed under the army had no claim or reason to be tried by military constitutions applicable only to the army wherein they were part. But they were to be ordered and governed according to the laws to which they were subject, though it were time of war, and the exercise of martial law, whereby any person shall lose his life or member or liberty, may not be permitted in time of peace, when the King's Courts are open for all persons to receive justice according to the laws of the land" (*Hist. Com. Law*, 34, 42).

Comyn, *Abridgment* :

"Martial Law cannot be used in England without consent of Parliament."

And so Blackstone (1765), i. 414 :

"Martial Law is built on no settled principles, but is entirely arbitrary in its decisions, and is in truth no law but something indulged rather than allowed as law, a temporary excrescence bred out of the distemper of the state, and not any part of the permanent and perpetual law of the kingdom. The necessity of order and discipline is the only thing which can give it countenance, and therefore it ought not to be permitted in time of peace when the King's Courts are open for all persons to receive justice according to the law of the land."

Lord Loughborough said in 1792 :

"Martial Law, as described by Hale and Blackstone, does not exist in England at all. Where it is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law merely because the decision is by a court-martial, but which has no affinity to that which was formerly attempted to be exercised here, which was contrary to the constitution, and has been for a century totally exploded," and goes on to describe Martial Law as meaning a law which claims jurisdiction over all military persons for all offences exercised by military officers (*Grant v. Gould*, 2 H. Bl. 69).

Modern Sense.—Since, however, the separation of Military Law from Martial Law took place, the latter term has been applied to something quite different—namely, the law of necessity promulgated by the Crown in case of domestic danger arising from foreign invasion or native insurrection to which both civilians and soldiers are equally subject, and which is enforced by military authority. The possible existence of such a state of things in

British dominions has been repeatedly recognised by statute; but it has been stoutly contested between writers on constitutional law and military law whether it is a part of our ordinary law or not.

Thus Sir James Stephen distinguishes four classes of Martial Law : "(1) the law martial executed by the constable and marshal upon troops in actual service, and especially in foreign service; (2) the law martial extended to times of peace upon emergencies, and for the punishment of breaches of the peace; (3) military law as stated in the annual Army Acts; (4) the common law right of the Crown and its representatives to repel force by force in case of invasion or insurrection, and to act against rebels as against invaders;" and he adds that (1) is obsolete, superseded by courts martial, (2) is illegal by the Petition of Right, but has been applied to a very different thing, namely (4). Professor Dicey says: "Martial Law, if it means the power of the Government or loyal citizens to maintain public order at whatever cost of blood or property may be necessary, is part of English law; but it is more often used for the name for the government of a country or district by military tribunals, which more or less supersede the jurisdiction of the Courts, and this, its proper sense (*i.e.* suspension of the ordinary law and the temporary government of the country or part of it by military tribunals), is unknown to English law" (*Law of Const.* 273). Lord Thring similarly says: "The proclamation of Martial Law is no more than an authoritative announcement of the existence of a state of things in which force will be used against wrongdoers for the purpose of protecting the public peace. In modern writers it is used to mean the laws of war or the exercise of force in case of rebellion" (*Official Manual of Military Law* 19). Hargrave, in an opinion given as to the legality of the trial of a civilian in Ireland by Martial Law previous to the statute allowing it of 1799, says that "before the passing of the Act it had been open to doubt whether the prerogative of claiming and exercising martial law in time of actual invasion by a foreign enemy, or in time of actual rebellion, was not merely referable to the law for governing the royal army and all connected with it (*i.e.* for governing those employed in defending the country against invasion and suppressing rebellion), and whether under martial law to try persons seized in rebellion or upon suspicion of being rebels before a court-martial constituted by the King's authority and punish them by death, or otherwise at the discretion of such a Court, was not an extension of martial law beyond its real object, and an infringement of the law of England, in a point of most serious character . . ." and adds in a note his conviction that "apart from statute this illegal right to try by martial law rebels taken in open insurrection was irreconcilable with the Petition of Right and the opinions then expressed of Coke, Rolls, Noy, Banks, and Hale" (*Forsyth, Opinions* 188-92).

On the other hand, historians such as Hume and Hallam say that there may be a Martial Law in time of insurrection or public disorder, exercised

sometimes by the Court of the Constable and Marshal (Hume, *History* v., App. 3; Hallam, *Const. History* i. 326 *ante*). Lawyers such as Finlason and Forsyth, and military lawyers such as McArthur, Clode, Hough, and Simmons, take the view that the Crown has a prerogative right to declare Martial Law and execute it in British dominions in times of necessity, such as insurrection or invasion, unaffected by the Petition of Right, which was only aimed at the suppression of Martial or Military Law in time of peace, on the ground that rebellion is war within the realm, and that therefore, in the words of Mr. Stuart Wortley in the House of Commons Committee on the Ceylon revolt in 1849, "the proclamation of Martial Law is the declaration of a state of war."

The best way of testing these two theories is to review the historical occasions on which Martial Law has been called into existence in British dominions, and the opinions then expressed by statesmen and lawyers.

Martial Law in the United Kingdom.—Instances of Martial Law up to 1689, when Military Law was finally distinguished from it, have been given above. Since that date the only time at which Martial Law has been proclaimed was in 1798 in Ireland; and it is noteworthy that no attempt was made to set it up either in the risings of 1715 and 1745 or the Gordon riots of 1780. In 1715 the King in Council issued a proclamation authorising all officers, civil and military, by force of arms if necessary, to suppress the rebellion. In 1745 all civil magistrates were charged by proclamation to do their utmost to prevent and suppress all riots, and put in execution all laws made for preventing the same. In 1780, during the Gordon riots, authority was given to the military to put down the riot without the intervention of the civil powers, but all persons arrested were, as had been publicly intimated, tried by ordinary law. In none of these was Martial Law proclaimed, although in the last at least the civil power was superseded. In 1798, on the outbreak of rebellion in the south of Ireland, proclamation was made by Order in Council to officers commanding the forces to employ them with the utmost vigour and decision for the immediate suppression of the rebellion; and this was followed by another to all general officers commanding the forces to punish all persons acting, aiding, or in any manner assisting the rebellion according to Martial Law, whether by death or otherwise, as to them should seem expedient for the suppression and punishment of rebels.

One of the Irish leaders, Wolfe Tone, was taken prisoner on board a French ship, tried by Court-martial in Dublin, and sentenced to death. The Civil Courts were still sitting there, and application was made to them for a writ of *habeas corpus*: his counsel urged that he was not a soldier in the King's service, and therefore no Court-martial could take cognisance of any crime imputed to him while the Court of King's Bench sat in the capacity of the great Criminal Court of the land. The Court granted the writ, though Tone died in prison from the effects of a self-inflicted wound; but it may be noticed that the rising had been crushed when Tone was taken.

A special statute was accordingly passed by the Irish Parliament to enable Martial Law to be in force whether the ordinary Civil Courts were open or not, which recited "the Crown's undoubted prerogative in executing Martial Law, which had so far restored the peace of the kingdom as to allow the course of the Common Law partially to take place," and contained a proviso that it did not abridge the acknowledged prerogative of the Crown for the public safety to revert to the exercise of Martial Law against open enemies or traitors (1799, 39 Geo. III. 3). But, presumably for greater security, an Act of Indemnity was afterwards passed in Ireland in respect of all acts done in enforcing the above-mentioned statute. In 1803 coercive measures again became necessary in Ireland, and the Parliament of the United Kingdom passed an Act in similar terms to the previous Irish one (43 Geo. III. 117). Mr. Pitt in introducing the Bill stated that the Bill was not to enable the Government in Ireland to declare Martial Law in districts where insurrection existed, for that power the Crown already possessed, but to . . . enable the Lord Lieutenant to order any persons taken in rebellion to be tried immediately by Court-martial, but not to supersede the Civil Courts in Ireland and to deprive subjects in civil causes of the ordinary law of the land ; and that if accepted it would be followed by a Bill to suspend the *Habeas Corpus* Act in Ireland. Mr. Hargrave, in speaking of this Act, in the opinion quoted above, says that "it makes a vast difference, for it contains recitals which recognise a royal prerogative of authorising trial and punishment of rebels by Martial Law, and that he was forced to resist any contrary impressions he previously had as to the real boundary of Martial Law."

Again, in 1833 (3 & 4 Will. IV. 4), a similar Act was passed ; and it has therefore been said that the Crown has now, by admission of Parliament, the undoubted right of executing Martial Law for the defeat or dispersion of armed rebels.

In the Colonies.—Whatever power the Crown possesses in this respect in the United Kingdom it possesses equally in the Colonies, whether settled or conquered ; for it seems that the Petition of Right applies to both as being merely declaratory of the Common Law of England regarding the limits of the sovereign's prerogative and the subject rights (Cockburn, L.C.J., in *R. v. Nelson*, *post*). *Vice versa*, whatever power in this respect the Crown has in the Colonies, except by colonial enactment, it also has in the United Kingdom.

Martial Law has been proclaimed in the Colonies in times of invasion or insurrection in the following cases : in Barbadoes in 1805 and 1816, in the latter case many rebels being sentenced to death by Court-martial ; in Demerara in 1823, where the rebellion began August 18th, Martial Law was proclaimed August 19th, an amnesty was proclaimed August 22nd, and on October 13th a missionary, John Smith, was tried by a Court-martial, of which the chief justice of the colony was a member, and was sentenced

to death, but died in prison, and martial law ceased on January 15th following; in Jamaica in 1831-2, and in 1865, on which latter occasion the outbreak began October 11th. Martial Law was proclaimed in certain districts October 13th, and a civilian, Gordon, was arrested October 17th outside the proclaimed districts, taken into a proclaimed district October 20th, tried there by Court-martial and sentenced October 21st, and executed October 23rd; in Canada in 1837-8, the Montreal district of Lower Canada being placed under Martial Law; in Ceylon in 1817 and 1848, in the latter case Courts-martial sitting in the proclaimed districts and the Civil Courts elsewhere; in Cephalonia, a protected state, in 1849; in Cape Colony, in certain districts, in 1836, 1846, and 1850; and in St. Vincent in 1862, but no Courts-martial were held, the persons arrested during the period of Martial Law being tried by the Civil Courts.

The Demerara case led to an exhaustive discussion in Parliament of the nature of Martial Law, on a motion by Mr. (afterwards Lord) Brougham that "the House viewed with serious alarm and deep sorrow the violation of law and justice manifested in these unexampled proceedings." He said that since the Petition of Right no such thing as Martial Law had been recognised in this country, that Courts founded on proclamations of Martial Law were wholly unknown, and that the proclamation of Martial Law would place every one, civilian or soldier, in the situation of a soldier. But he admitted that in presence of a great emergency—*e.g.* invasion or rebellion, where there is no time for the slow and cumbrous proceedings of Civil Law—a proclamation might perhaps be justifiably issued for excluding the ordinary tribunals, and directing that offences should be tried by Military Courts, but this was only justifiable by necessity. Sir James Mackintosh said the only principle on which the law of England would tolerate what is called Martial Law is necessity: that Martial Law put in force against rebels and enemies was only a more regular and convenient mode of exercising the right to kill in war, a right originating in self-defence and limited to those cases where such killing is necessary as a means of insuring that end; put in force against rebels it can only be excused as a mode of more deliberately and equitably selecting persons from whom quarter ought to be withheld, in a case where all have forfeited their claim to it: it was nothing more than a better regulated decimation, founded on choice instead of chance, to provide for the safety of the conquerors without the horrors of undistinguished slaughter, justifiable only where it is an act of mercy, by the law of England it could not be exercised except where the jurisdiction of the Courts of Justice is interrupted by violence. The Government admitted that Martial Law could only be justified on the ground of absolute necessity, but the motion was refused by 193 to 146 (11 *Hansard*, N.S. 968, 976).

During the Canadian rising in 1837-8, the British Law Officers advised that "the Governor of Lower Canada had the power of proclaiming in any

district in which large bodies of the inhabitants are in open rebellion, that the Executive will proceed to enforce martial law ; but such proclamation conferred no power on the Governor which he would not have possessed without it, and the object of it could only be to give notice to the inhabitants of the course which the Government is obliged to adopt for the purpose of restoring tranquillity. In any district in which by reason of insurrection the ordinary course of law cannot be maintained, the Governor may without any proclamation proceed to put down the rebellion by force of arms, as in the case of a foreign invasion, and for that purpose may lawfully put to death all persons engaged in the work of resistance. The right of resorting to such an extremity is a right arising from and limited by the necessity of the case. The prerogative does not extend beyond the case of persons taken in open resistance, and with whom by reason of the suspension of the ordinary tribunals it is impossible to deal according to the regular course of justice. When the regular courts are open, so that criminals may be delivered over to them to be dealt with according to law, there is no power in the Crown to adopt any other course of proceedings ; such power can only be given by the legislature (as in Ireland). The question how far martial law supersedes the ordinary tribunals can never, in our view of the case, arise : it cannot be said in strictness to supersede the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded. It can never be enforced for ordinary purposes of civil or even criminal justice, except in the latter so far as necessity arising from actual resistance compels its adoption " (Clode ii. 500).

The Ceylon rising of 1848 led to the appointment of a Committee of the House of Commons to inquire into the proceedings under Martial Law, before which the Judge Advocate General, Sir David Dundas, gave evidence; and his view of Martial Law as a law of necessity was adopted by Sir James Stephen in his opinion in the Eyre case. He stated it as his opinion that the Irish Act (39 Geo. III. 3) was "a plain recognition by Parliament of the prerogative of the Crown to declare martial law, and an assurance to the country that the Crown would always, when it has opportunity, come to Parliament for a confirmation of its authority, and then proceed according to law ; but an emergency may arise where necessity is thrown absolutely on the Executive, which must decide for itself then and there upon that necessity ; and if there be such a force as to set at defiance the constitutional authorities of the realm, it is the duty of the Executive, and there is royal authority to do so at home and abroad in order to put it down. . . . The proclamation of martial law is a notice to all to whom it is addressed that there is now in the land another measure of law and mode of punishment than there was before it." In the debate which took place in the House of Lords, Lord Torrington, who was Governor of the Colony at the time of the revolt, stated that he had put Martial Law in force with the advice and concurrence of the general in command of the forces and the Queen's

Advocate ; that the Civil Courts were closed ; that the crimes for which the rebels were punished were treason, aggravated murder, and highway robbery ; that prisoners who had committed offences prior to the proclamation were tried by the Supreme Court, while those guilty of high treason and correspondence with the rebels during its continuance were shot after trial by Court-martial.

The Duke of Wellington's Definition.—The Duke of Wellington said that Martial Law was neither more nor less than the will of the general who commands the army, and was in fact no law at all ; and Earl Grey agreed with him, saying that that was in accordance with the instructions he as Colonial Secretary had given to Lord Torrington, on the advice of Lord Cottenham and Lord Campbell—viz., that what is called proclaiming Martial Law is no law at all, but merely, for the sake of public safety in circumstances of great emergency, setting aside all law and acting under military powers, a proceeding which requires to be followed by an Act of Indemnity when the disturbances are at an end. A motion in the House of Commons that "the punishments inflicted during the disturbances were excessive and uncalled for" was rejected by 282 to 202 votes (Clode ii. 501).

It must be observed that the Duke of Wellington was referring to the state of law in a foreign country occupied by an invading force, which was not the case then under discussion, for the inhabitants have no legal rights against persons exercising Martial Law, and the conduct of the latter need not therefore require justification by necessity ; but subject to the considerations of necessity, the will of the general does in cases of rebellion too decide what the law shall be, and how it shall be executed.

In the case of Cephalonia, in 1849, the Government refused a proposal for an inquiry by Royal Commission into the measures taken to suppress the disturbances ; the facts being that Martial Law was proclaimed August 30th, and an amnesty on October 29th, and that between these dates sixty-eight Courts-martial were held, forty-four persons sentenced, twenty-one executed, and thirty-two flogged or banished (Clode ii. 502).

Martial Law by Governor's Proclamation.—In the Cape Colony disturbances in 1851, the Governor desired to know the extent of his powers under the Mutiny Act, and whether he could commute death sentences passed by Courts-martial ; and part of the opinion of the then Attorney-General of the Colony may perhaps, in view of present circumstances, be quoted.

"The question is whether a provision, which in terms applies to soldiers (sentenced for military crimes), can be extended to persons not soldiers who were sentenced by court-martial. As regards this, martial law which is *de facto*, and perhaps *de jure*, as some colonial lawyers think, established by the Governor's proclamation, is distinct from military law under the Mutiny Act and Articles of War. By that species of martial law which, originating in public emergency, extends over all citizens whether soldiers or not, crimes and criminals which have no sort of connection with the Mutiny Act and the Articles of War are brought under the jurisdiction, or at least under the power, of courts-

martial. . . . The Mutiny Act and Articles of War do not necessarily regulate either sentences pronounced by courts-martial against such criminals in regard to such crimes, or the powers of the Commander-in-chief to commute such sentences. . . . Some lawyers think that martial law is *de jure*, and that to suspend the ordinary law and establish martial law is an act competent to the Executive, and one for which no legislative sanction is required, being a branch of ordinary law, and not a foreign and disturbing force obeyed at the moment because irresistible but punishable afterwards unless protected by the legislature. I think an Act of Indemnity is essential in regard to every act *prima facie* actionable of which the sole defence capable of being pleaded in a civil court rests upon the Governor's proclamation proclaiming martial law or the authority of the Commander-in-chief acting under it. Thus, subjecting rebels to hard labour as well as imprisonment would require such an Act. The Commander-in-chief can order rebels to be kept to hard labour on the same principle as, if the circumstances required it, he could order them to be shot. The need of an Act of Indemnity in general distinguishes martial law which is merely the will of the Commander-in-chief, and that military law stated in the Mutiny Act and Articles of War. . . . If these convicts cannot be detained in districts where martial law now exists, and where it will hereafter continue to exist, a difficulty will arise. Doubts may exist whether the civil courts could recognise in any shape martial law as created by proclamation and not by ordinance; greater doubts may exist whether the civil courts could recognise after withdrawal of martial law imprisonments awarded under martial law and being suffered in districts where martial law had never existed; and still greater doubts whether the civil courts in districts where martial law has not been proclaimed at all could recognise in regard to prisoners brought there from martial law districts sentences of courts-martial upon such persons as these rebels. Questions of much delicacy might arise if these prisoners applied to the Supreme Court in Cape Town for liberation, or were to kill or be killed in trying to escape from a convict station at this end of the Colony. Legislation will be necessary to legalise effectually the imprisonment of all unmilitary persons sentenced by courts-martial or the Commander-in-chief during the existence of martial law and kept in confinement where martial law does not exist" (Clode ii. 506).

An Act of Indemnity was passed in 1853, and also an Act to legalise and continue the imprisonments under sentences of courts-martial.

In 1857 Sir R. Bethell, A.G., advised that there was power to proclaim Martial Law in Hong Kong.

Governor Eyre's Case.—The nature and limits of Martial Law also underwent thorough discussion in the celebrated case of Governor Eyre of Jamaica, both in the Courts and Parliament. The short facts of the case were, that a rising of the blacks took place, some white persons were murdered, and damage done to property: the Governor proclaimed Martial Law in accordance with the provisions of a Colonial statute, and directed the military officers to suppress the insurrection. This they did in two days, executing nearly four hundred persons (eighty-five without trial), and punishing six hundred others by flogging and imprisonment; but under the power given by the Colonial Act, Martial Law continued for a month, and in the course of it a civilian, Gordon, was arrested in a district where Martial Law had not been proclaimed was removed to another where it was in force,

and where it was alleged he had committed treason by inciting the blacks to rise, and after trial by Court-martial was shot. The Legislature of the island then passed an Act of Indemnity to all concerned in executing Martial Law. A Parliamentary Commission was sent to the island, and after exhaustive investigation into all the circumstances of the execution of Martial Law, reported that the declaration of Martial Law was justifiable, the proceedings were rebellious and of deep design, and that the Commissioners fully approved the conduct of the Governor and officers in the prompt measures which they took ; but that Martial Law was continued longer than was necessary, and the punishments that were inflicted were excessive in the later stages, and that much that was lamentable might have been avoided if clear and precise instructions had been given for the regulation of those engaged in suppressing the rebellion : and as regards Gordon, they were of opinion that the express evidence forthcoming did not appear to be sufficient to establish the charge against him, and that there was no wide-spread conspiracy to which he was privy. These conclusions were concurred in by the Colonial Secretary, Mr. Cardwell, and criminal proceedings were brought against General Nelson, who was in command of part of the military forces engaged.

On April 16th, 1867, the Lord Chief Justice delivered his charge to the grand jury, and after a careful historical examination of the whole subject expressed the opinion that the Crown had no power to proclaim Martial Law in England since the Petition of Right, and therefore a Colonial Governor under his commission had no such power ; that the recital in the Irish Acts relating to Martial Law had no legal effect ; that the Jamaica Act only applied to military persons : and told the jury the questions for them were whether there was any power to put Martial Law in force, and if there was, whether it was honestly applied, although if ever there were circumstances in which it was lawful to apply Martial Law, they were present in this case. The grand jury returned no bill, and made a formal presentment that Martial Law should be more clearly defined by legislative enactment.

Similar proceedings were also taken against Governor Eyre, and on June 2nd, 1868, Blackburn, J., charged the grand jury. He directed them that the Governor had under his commission whatever powers the Crown possessed by its prerogative in the reign of Charles II., when the colony was established, as well as the powers under the Jamaican Act : that the Crown had in very early times claimed the prerogative of keeping its armed forces in order by summary process, and this undoubtedly existed in time of war and insurrection, and also a similar privilege in case of disturbance over others than persons belonging to the army ; and also against insurgents while the rising lasted, and for a short time afterwards, the Crown had *de facto* exercised the power of proclaiming Martial Law in the sense of using summary proceedings to punish insurgents and check the spread of

the rebellion, so as to "stamp it out." This power the Crown did in fact use, at least in time of war, the last serious instance being in the reign of Elizabeth during the Northern rising; and Charles I. did the same thing in peace time till the Petition of Right. The Legislature in that statute did not in terms declare that in time of war the Crown had no such power, but it did not by any means follow, nor would it be a reasonable inference, that it was legal to do so in time of war. There had been no case since then in which it had been necessary to consider judicially the limit of the powers of the prerogative in time of war, but it was safe to say that in time of peace the Crown had no such power. He thought Hale's deduction from the Earl of Lancaster's case, that "it would appear from this record that in time of peace the Crown cannot enforce Martial Law, and regularly when the King's Courts are open it is time of peace, in judgment of law" very cautious; and he agreed with it, and thought that though it had not been quite settled what was the Crown prerogative in such cases (*i.e.* insurrection) still this much was settled, that it must, if it exist at all, be strictly limited to necessity; and that in this case that limit was passed by the maintenance of Martial Law so long after all disturbance had ceased. The Jamaican Statute, however, gave the Governor much greater powers—namely, to do, after complying with certain formalities, that which the Petition of Right declared the Crown could not do in time of peace, and which it is doubtful whether the Crown could even legally do in time of war—namely, supersede the common law altogether, and punish all manner of offences then done by summary process, in order that the offender might be summarily tried and punished, the great object being to stop the insurrection or invasion. The grand jury returned no bill.

This subject was debated in the House of Commons on July 2nd, 1867, when Mr. O'Reilly, after calling attention to the law as laid down by the Lord Chief Justice in his charge to the grand jury, moved that—

"Whereas by the law of the kingdom no man may be prejudged of life or limb but by lawful judgment of his peers or by the law of the land, and no commission for proceeding by martial law may issue forth to any person or persons whatsoever, by colour of which any of Her Majesty's subjects may be destroyed or put to death contrary to the laws and practice of this land; and the pretended power of suspending of laws or the execution of laws by legal authority without consent of Parliament is illegal, this House will regard as utterly void and illegal any commissions or proclamations purporting or proclaiming martial law in any part of this kingdom,"

Opinions Expressed in the House of Commons.—The following opinions were expressed:

Mr. Forster said he did not agree with the Lord Chief Justice that legislation was desirable to settle the question, for any attempt to provide for the suspension of the ordinary law for the protection of life and property must be regarded as an abdication of legislative power. He admitted that to the restoration of peace and the preservation of authority everything else had to give way, and whatever acts of

military authority were absolutely necessary for that purpose must be sanctioned, but he had seen no case in which what was embodied in the notion of martial law, the power of punishment after the suppression of the outbreak, was essential.

There were two theories of martial law: one, that if martial law was proclaimed in any part of British dominions it meant military law, and giving to military and naval officers similar powers with regard to civilians which they possessed with regard to members of their own services—*i.e.* a court-martial constituted under the same regulations as one for the trial of a military or naval officer—and this view had been held by all the lawyers in our history, from Hale to Cockburn: the other, that martial law applied to civilians was not military law, but the arbitrary will of the Executive; the Instructions issued by the Admiralty for the guidance of naval officers did not agree with the law as stated by the Lord Chief Justice, for they said that the arbitrary will of the officers in such cases superseded the ordinary law for the time being in the same manner and degree as if the district where it was proclaimed were enemy's country.

Mr. Gathorne Hardy, Secretary of State, on the other hand, said that it was lawful according to Hale to call out any force to put down insurrection, and put in force military instead of ordinary law: military power included military law. The Lord Chief Justice's view was not law, and it was not in accord with those of a former Judge Advocate, Sir David Dundas, and the last Judge Advocate, Mr. Headlam; and the resolution embodied doctrines which had never been affirmed either by statute or by judicial decision.

Mr. Mill expressed the view that there was no such thing, properly speaking, as martial law as regards non-military persons, and it had no existence except for military purposes. Parliament could give it existence, but the Crown could not, being only one branch of the Legislature. But there was a law of necessity, *e.g.*, in case of rebellion, requiring that acts not justifiable by the ordinary law of the country should be done, and that these should be acts of suppression, not punishment. In case of public necessity, those who acted on it as in private necessity, and did under supposed necessity what they would not ordinarily be justified in doing, should be amenable to the laws of their country; and he contended that the law of necessity justified the Executive in doing these things if no such thing as martial law had ever been heard of: but the necessity which existed must be shown, not to the satisfaction of a court-martial only, but of the regular courts of the country.

Mr. Headlam thought it better not to alter the existing law: whether they called it martial law or the law of necessity it was the same thing—the difference was merely verbal. If the Executive authority superseded the ordinary law of the country when a sufficient case of necessity arose, they were all agreed that it should be supported in that, and that it should be covered by an Act of Indemnity afterwards. A precise declaration might fetter and control public men, and make them too timid to perform their duty in emergency; on the other hand it might tempt weak men to exercise powers which ought not to be exercised unless absolutely necessary. Those were two different kinds of dangers, and the best way of guarding against them was to leave the law as it was, and make it perfectly clear to persons in authority that they must act in case of emergency and take the responsibility upon their own shoulders, looking to an Act of Indemnity to exonerate them if they had acted honestly and in good faith.

Mr. Cardwell, ex-Colonial Secretary, agreed that while there was properly no such thing as martial law, there was no doubt a law of necessity which required that certain acts should be done for the suppression of the rebellion, but not for

the punishment of persons concerned in it : a law of necessity which nobody acted under, except under very great responsibility and liability to render account to the ordinary tribunals of the country. Persons who, called upon by no act of their own, but for the public safety, took a great responsibility of that kind, were placed in a position of extreme difficulty ; and it often happened that to protect them, as Parliament afterwards thought just, a bill of indemnity was passed. That, however, was an act not of prerogative but of Parliament, and until such an Act these persons acted subject to a liability to account to the ordinary tribunals. Believing that to be law, and a wholesome state of law, he did not think any alteration of it necessary. The law of necessity to which he had referred was strictly limited in time, and operative only for repression and not for punishment ; and, in Mackintosh's words, to continue to act upon that necessity after it had expired was an enormous crime.

Major Jervis called attention to the terms of the proviso of the Irish Act of 1833, and said martial law was the law of the strongest, and if carried out by any governor of a colony the House would stand by him if he was in the right.

In the result the motion was withdrawn (188 *Hansard*, 899).

Conclusions from Cases.—To sum up the result of the foregoing precedents, it seems that by constitutional practice at any rate, if not in principle, Martial Law in British dominions, where it exceeds the Common Law prerogative of the Crown and its officers to keep public order by the use of force, including the assistance of the military, as used in the case of riots, is not part of ordinary English law, so that any one exercising it is liable at law to any person injuriously affected by it, unless Parliament or the colonial legislature, as the case may be, indemnifies him for what he did to meet the necessity of the moment. Lord Chief Justice Cockburn declared that "the exercise of martial law cannot be put on a worse footing than saying that, though it is illegal, a governor or other Crown executive officer is bound in case of necessity to put it in force and trust to Parliament afterwards affording a statutory indemnity" (*R. v. Nelson*, special report, 74) ; but the reason for this apparently illogical position seems to be, in Mr. Forster's words in the Jamaica debate, that "to provide for the suspension of the ordinary laws for the protection of life and property by the substitution of military authority must be regarded as an abdication of legislative power" ; and this has been uniformly the view of the Colonial Office. Thus we find the Duke of Newcastle, when Colonial Secretary, objecting to the statement in the Colonial Act of Indemnity passed after the existence of Martial Law in St. Vincent in 1862, that "the proclamation of Martial Law had been lawfully issued," on the ground that "the proclamation was right and necessary but was not strictly lawful, and to declare it so would be to endanger a most important constitutional principle. In proclaiming Martial Law the executive authority in fact declares itself obliged, for the protection of the community, to neglect the law, trusting to the Legislature to relieve all who in obedience to constituted authority may have acted in the defence of the public safety from the consequences of so doing. The indemnity contained in the second clause is too wide. It would enable a person to escape punishment

for the most wanton and unjustifiable acts, even to homicide, if it could be shown that he had been in any wise engaged in suppressing or endeavouring to suppress the insurrection" (Clode ii. 511). So in 1867 Lord Carnarvon, when Colonial Secretary, refused to recommend for the royal assent an enactment of Antigua, making it legal for the Government to proclaim Martial Law.

Circular to Governors of Colonies.—As this despatch was circulated to all governors of colonies, it may perhaps be quoted at length, as embodying the tradition of our Colonial Office.

An enactment which purports to invest the Executive Government with permanent power of suspending the ordinary law of the Colony, of removing the known safeguards of life and property, and legalising in advance such measures as may be deemed conducive to order by the military officers charged with the suppression of disturbances, is entirely at variance with the spirit of English law. If its existence can in any way be justified, it can only be because there exists such a state of established insecurity as renders it necessary, for the safety and confidence of the well-disposed, that in times of national emergency the Government shall possess this extraordinary facility for the suppression of armed rebellion; but, whatever apprehensions or disturbances may exist in any of Her Majesty's colonies, it is certain that no such chronic insecurity prevails in any of them, and in no colony therefore should the power given by the present law to the Governor of Antigua be suffered to continue. . . . In giving you these instructions Her Majesty's Government must not be supposed to convey an absolute prohibition of all recourse to martial law under stress of great emergencies, and in anticipation of an Act of Indemnity. The justification, however, of such a step must rest on the pressure of the moment; and the Governor cannot by any instructions be relieved from the obligation of deciding for himself under that pressure whether the responsibility of proclaiming martial law is or is not greater than refraining from doing so (Clode ii. 667).

An exception to this rule is however made in the case of India, where the Governor-General is empowered by statute to declare and establish Martial Law for the safety of the British dominions and the security of the lives and property of their inhabitants, and to direct immediate trial by Court-martial of all persons owing allegiance, and then in arms in open hostility to the Government, or in the act of opposing by force of arms the authority of the same, or in the actual commission of any overt act of rebellion against the State, or in the act of openly aiding and abetting the enemies of the Government (Regulation X. of 1804).

Acts of Indemnity.—The fact that every proclamation of Martial Law in the United Kingdom or the Colonies has been followed by an Act of Indemnity (they are set out in *Phillips v. Eyre*, 1870, R 6, Q.B. 15) would of itself be strong ground for showing that it is unknown to the ordinary law, although advocates of the extreme Crown prerogative might regard them as only measures of precaution, and point to the fact that the Irish Parliament passed an Act of Indemnity for all acts done in good faith and of necessity in the execution of the Irish Martial Law Statute of 1799

(1801, 41 Geo. III. 104). But this inference is strengthened by the fact that Acts of Indemnity have always been purposely framed so as to give Parliamentary sanction only to such acts as have *bonâ-fide* and of necessity been done to meet the demands of the emergency justifying the proclamation of Martial Law. Thus it was held that such an Act will not protect persons who have been exercising Martial Law from criminal liability for any excesses of authority committed by them, on the ground that these are not justified by necessity (*Wall's case*, 1802, 28 State Trials 51; *Wright v. Fitzgerald*, 27 *ibid.* 765); and Mr. Cardwell, Colonial Secretary, in a despatch to the Commissioners sent to inquire into the circumstances of the Jamaica rising in 1865, stated that the Crown had been advised by the Law Officers that "an Act of Indemnity will not cover acts done by the Governor or his subordinate officers unless they are such as, in the case of the former, be reasonably and in good faith considered to be proper for putting an end to the insurrection, and in the case of the latter done in conformity with the orders of their superiors, or if done without orders, then in good faith and the belief that they were proper for suppressing the rebellion and the preservation of the public peace. As to all acts done by military authority, the proclamation of Martial Law under the Jamaica Statute of 1844 was a complete indemnity in the proclaimed districts by the Indemnity Act itself" (Finlason, *Martial Law*, 40). Colonial Secretaries have also frequently refused to recommend for the Royal assent Colonial Acts of Indemnity which go beyond these limitations: e.g. the St. Vincent case above.

Methods of Administering Martial Law.—The justification, then, of Martial Law being necessity only, as entitling those exercising it to indemnity, the method of administering it is also determined by the necessity of the circumstances of each particular case; and if so, the Mutiny Act and Articles of War do not limit and determine the method of executing it, in spite of Mr. Forster's statement above.

Sir J. Stephen in his joint opinion with Mr. E. James in the *Eyre* case adopts Sir David Dundas' definition given to the House of Commons Committee on the Ceylon disturbances in 1849, that "Martial Law is the rule of necessity, and when it is exercised by men empowered to do so, and they act honestly and vigorously and with as much humanity as the case will permit in the discharge of their duty, they have done that which every good citizen is bound to do"; and defines Martial Law as "the assumption by the officers of the Crown of absolute power exercised by military force for the suppression of insurrection and the restoration of order and lawful authority. The officers of the Crown are justified in any exertion of physical force, extending to destruction of life and property to any extent and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive measures, but are liable civilly and criminally for each excess. They are not justified in inflicting punishment after

resistance is suppressed and after the ordinary courts of justice can be reopened. The courts-martial by which this Martial Law is administered are not courts at all, or courts-martial properly speaking; they are merely committees formed for the purpose of carrying into execution the discretionary power issued by the Government. On the one hand they are not obliged to proceed in the manner pointed out by the Mutiny Act and Articles of War; on the other hand, if they do so proceed, they are not protected by them as the members of a real court-martial might be, except so far as such proceedings are evidence of good faith. They are justified in doing with any forms and in any manner whatever is necessary to suppress insurrection and restore peace and the authority of law. They are personally liable for any acts which they may commit in excess of that power, even if they act in strict accordance with the Mutiny Act and Articles of War."

The opinion of Sir D. Dundas in this part of the subject may also be quoted. He expressed his opinion that "Martial Law is a *lex non scripta*—a law of necessity: there is no practice laid down for it, but it must be exercised by those who have to exercise it firmly, truthfully, and with as much humanity as occasion allows, according to the conscience and good sense of those who have to exercise it: the military tribunals administering it need not be presided over by military officers, and they are not necessarily guided by the Mutiny Act or Articles of War; but any officer forming part of them could not go very far wrong if he adhered as closely as possible to the mode of administering law under the Army Act, and the oath under that Act would be a very safe and honest guide in such critical cases; no difference is made between soldiers and civilians in punishing offences." Other military lawyers agree that the military code prevails, and not the civil law; the mode of trial is summary and speedy, and the strict rules of evidence followed in Civil Courts are not adhered to.

In Ceylon in 1817 and 1818 the Governor issued his warrant to certain officers of rank, commanding them to hold Courts-martial in their districts, together with letters of instructions detailing the mode of trial so as to ensure a fair trial; and the courts were conducted with the forms laid down by the Articles of War. In 1848 a British commanding officer in one of the proclaimed districts of Ceylon instructed his subordinate officer "not to bring to trial any person you are not certain of convicting: your power is unlimited, but at the same time it will be well to adhere to the Articles of War as far as possible, appointing a judge advocate and provost marshal: and after disposal of each culprit, you will forward the proceedings to me."

In India, as already pointed out, the Governor-General is empowered by statute to declare and establish Martial Law. Advocate-General Spankie, in advising concerning sentences of Courts-martial passed in the Cuttack rising in 1817-18, said that "the statute meant that none but cases of the simplest and most obvious criminal nature should be subject to such trial, and that in the cases under review there seemed to be no

reason why the criminals should not have been set before the ordinary court, agreeably to the express directions and instructions of the Government"; and he described Martial Law as "in fact the law of social self-defence superseding under the pressure and therefore the justification of extreme necessity the ordinary forms of justice. Courts-martial under martial law, or rather during the suspension of law, are invested with the power of administering that prompt and speedy justice in cases presumed to be clearly and indispensably of the highest species of guilt. Its object is self-preservation by terror and the example of speedy justice. But courts-martial which condemn to imprisonment and hard labour belie the necessity under which alone the jurisdiction of courts-martial can lawfully exist in civil society." (Hough, 1855, *Military Law* 548).

In the Demerara case (11 *Hansard* N.S. 961, 1206) the question was raised which law was to be applied by the Court-martial sitting under Martial Law, the law of the country (Dutch), or the law of England by which alone soldiers would be governed; Mr. Smith having been sentenced to death, which was justifiable by the Dutch law as punishment of suspicion of treason, but not by English law. The Attorney-General (Gifford) inclined to the former view; others who took part in the debate did not; but the view of Simmons and Finlason is that, if civilians are amenable like soldiers to Martial Law, and the latter are undoubtedly governed by the law of England, the former must be so too. On the principle of necessity, however, the fact of applying one kind of law and not another is only important as evidence of the bad or good faith of the Court-martial on the question whether its members shall be indemnified for their acts.

Relation of Civil Courts to Martial Law.—In old days prohibition lay to the court of the marshal and that of the constable and marshal from the Court of King's Bench, if it exceeded its jurisdiction (2 Hawkins, *P.C.*, ch. iv., p. 17); and the High Court of Justice in England, and similarly the Supreme Court in any colony, have the right of supervising proceedings by Court-martial. But owing to the careful provisions of the Army Act in this respect, confining the sphere of the ordinary Court-martial under military law to purely military offences in most places, and taking care to secure a preponderating jurisdiction to the Civil Courts for serious civil offences, this very rarely can take place. Thus the Court of Queen's Bench has refused to prohibit a Court-martial which has passed sentence on a soldier after a trial conducted with substantial justice, though not according to the strict procedure of Civil Courts (*Grant v. Gould*, 1792, 2 H. Bl. 69); and it has refused a writ of *habeas corpus* in the case of soldiers detained in custody for trial by Court-martial where there is no oppressive delay shown. Under Martial Law the considerations are different. If it is in force throughout a colony, no Courts can sit which can interfere with the Courts-martial; but Martial Law may only be put in force for certain purposes or in certain places: e.g., in Jamaica, in 1867, only certain districts of the

island were put under Martial Law, and in the same colony, in 1757, the British Law Officers advised that the proclamation of Martial Law did not suspend the ordinary course of law and justice any further than was absolutely necessary to answer the exigencies of the public and military service, nor did it suspend the exercise of legislative authority (Forsyth, *Opinions*, 288; Chalmers, i. 267). In such a case the questions suggested in the opinion of the Attorney-General of Cape Colony in 1851, quoted above, may arise: *e.g.*, persons arrested by the military authorities in districts under Martial Law, and kept in military custody there before or after sentence, or brought to districts where Martial Law does not prevail to undergo their sentence, may apply to the Civil Courts for a *habeas corpus*. English Courts have decided that the privilege of this writ is not available for alien enemies or persons consorting with enemies made prisoners of war; and in one case, that of the Canadian prisoners in 1838, have refused it to rebel subjects brought within the realm of England, who on indictment in a Colonial Civil Court had confessed their guilt, and had thereupon, under the provisions of a special colonial statute, received a pardon from the Governor conditional on their engaging to leave the colony, on the ground that although they had not been tried or sentenced on a criminal charge by a Civil Court, and the effect of the statute was confined to Canada, still they were on their own admission guilty of treason, and any good subject was therefore bound to keep them in custody for trial and punishment (*R. v. Batchelder*, Fry's Special Report, and 5 M. and W. 32); and the Courts have held that they, having only civil jurisdiction, could not grant a *habeas corpus* to bring up a defendant to be charged in execution who is under military arrest under circumstances which might or might not lead to a Court-martial unless he is in the custody of a civil gaol-keeper (*Jones v. Danvers*, 1839; *ibid.* 234). But where a Civil Court has jurisdiction over the whole of a colony in districts of which Martial Law has been proclaimed and Civil Courts are not sitting, an application for a writ of *habeas corpus* before the Supreme Court in the case of a civilian rebel subject in military custody in a proclaimed district must, it would seem, be successful, although the moment he was set free he could be re-arrested and tried civilly, unless that military custody can be justified by statute or common law (*Allen's case*, 1860, 3 E. and E. 338), or by the sentence of a duly constituted Military Court in a place where no civil judicature prevails (*R. v. Suddis*, 1801, 1 East, 306).

Where a person arrested by military authority in a district where Martial Law does not prevail is taken to another where it does, and put on trial there, it seems that that is an illegal act and unjustifiable, except perhaps if the executive officer reasonably comes to the conclusion that a dangerous insurrection and conspiracy is spreading throughout the land, likely to break into insurrection all over it if not suppressed, and that it was really proper in order to suppress it that the particular person should be summarily tried because there is no time to wait (*Blackburn J., R. v. Eyre*, above). Lord

Chief Justice Cockburn and the majority of the judges were, however, of opinion that the procedure made use of in this respect against Gordon was altogether unjustifiable, and he laid down the following rule for the guidance of executive officers who set Martial Law in force: "The officer, so far as his criminal responsibility is concerned in judging of the necessity which it is admitted on all sides is the sole justification for reverting to martial law, should not only act with an honest intention to discharge his public duty, but should bring to the consideration of the course to be pursued the careful, conscientious, and considerate judgment to be expected from one invested with authority; and having done this he would not be liable for an error in judgment or excesses by subordinates if advised that the law of the colony justify him."

By Statutes of 1700 (11 & 12 Will. III. & Mary 7) and 1802 (42 Geo. III., 85) no executive officers of the government of British colonies are liable to criminal proceedings in the courts of the colonies, but only to the Queen's Bench in England: but they are liable civilly (*Hill v. Bigge*, 1841, 3 Moore P.C. 466). A Colonial Act of Indemnity will, however, relieve them from any liability to criminal or civil proceedings in the Colonial or British Courts, though Blackburn J. doubted whether it would do so as regards criminal proceedings in England if a true bill had been found previously to the passing of the Act. In *Phillips v. Eyre* above, Willes J., in giving the judgment of the Court that the Colonial Act of Indemnity was a good defence to any civil action in respect of proceedings under Martial Law, said that it must not be understood that the Court thereby intended to express any opinion that the plea might not be sustained upon more general grounds, as showing that the acts complained of were incident to the enforcement of Martial Law, a question which it was unnecessary to discuss (31).

It is difficult to see in what respect the principle which we have adopted of deliberately refraining from giving shape or substance to this law of necessity, by requiring that its application shall be justified by the Legislature, and that its application shall only interfere with ordinary law to the extent of the necessity demanded by the particular emergency, has any advantage from a legal point of view over the plan of giving previous legal sanction to whatever measures are necessary for the safety of the country in emergency, under the same conditions as are now applied in case of statutes of indemnity. Lord Chief Justice Cockburn was in favour of some such plan being adopted. It may be worth while to supplement the consideration of our own system with a short statement of the views taken on this subject in the United States and France.

United States.—In the United States there has been some considerable discussion of the subject, chiefly due to the state of circumstances brought about by their Civil War, 1861—1865; and such discussion has been more

comprehensive and discriminating, owing to its recent date, than it has been in England.

Kent (1896 [10th ed.] *Comm.* i. 341 note) says, "Martial Law is quite a distinct thing from ordinary Military Law, and is founded on paramount necessity, and proclaimed by a military chief": Bishop (*Crim. Law*, 1882, ss. 43—68) says, "Military Law is distinct from Martial Law, which in fact is, as Blackstone says, no law, but an expedient resorted to in times of public danger similar in its effect to the appointment of a dictator"; and the United States' Instructions to their Armies in the Field define martial law as "simply military authority exercised in accordance with the laws and usages of war; it may be totally suspensive of civil authority, or it may be light, and the Courts may go on in their ordinary course (as in Kentucky, in the Civil War, where martial law was not allowed to interfere with suits or proceedings which did not affect the military operations or the constituted United States authorities): there is no martial law in peace, and necessity only justifies it." Chief Justice Chase, of the United States Supreme Court, in the case of *Ex parte Milligan* (1866, 4 Wall. 2), thus classified the various legal aspects of military and martial rule. "There are three kinds of military jurisdiction, one to be executed in both peace and war; another in foreign war outside the limits of the United States, or in time of rebellion and civil war in states or districts occupied by rebels treated as belligerents; and a third to be executed in case of invasion or insurrection in the United States, or during a rebellion in States maintaining an adhesion to the National Government when public danger requires its exercise. The first is Military Law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second is Military Government, superseding as far as may be deemed expedient local law, and executed by military commanders, under direction of the President, with the express or implied sanction of Congress; the third is Martial Law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited in case of justifying or excusing peril, by the President, in times of insurrection or invasion, or civil or foreign war within districts or localities where the ordinary law no longer adequately secures public safety and private right" (141-2).

The question has usually been raised in the form of a *habeas corpus* writ directed to military authorities having custody of a prisoner in districts subject to Martial Law. This subject has been dealt with generally by Attorney-General Cushing in 1857, in advising the Executive that the Governor of a territory of the United States had not among his legal attributes the power to suspend law and substitute Martial Law in place of Civil Law, when this was admitted to be the object of preventing the use of a writ of *habeas corpus* in behalf of certain persons held in confinement by military authority on a charge of treasonable intercourse with the enemy. After remarking that Hale and Lord Loughborough confound Martial Law with

Military Law, and that Martial Law as defined by the Duke of Wellington in the Ceylon Debate is widely different from that in the mind of Earl Grey, which was of Martial Law as a purely domestic fact proclaimed in rebellion or insurrection in England, Ireland, or some colony, which seemed to him evidence of "the extreme want of preciseness, with which so vital a question had been discussed and expounded in England, though in his own country it had been even worse," Mr. Cushing says:

Martial Law must be distinguished according as it is a foreign or international fact, or as it is a domestic or municipal fact. As executed in any country by the commander of a foreign army, it is an element of the *jus belli*, incidental to the state of modern war, and appertaining to the law of nations. The commander of an invading, occupying, or conquering army rules the country with supreme power, limited only by international law and the orders of the sovereign or government which he represents. By the law of nations *occupatio bellica* in a just war transfers the sovereign power of the enemy's country to the conqueror. Such occupation by right of war, so long as it is military only, *flagrante bello*, will be the case put by the Duke of Wellington, of all the powers of government resumed in the hands of the Commander-in-chief, or that of the United States' armies in Mexico. This does not enlighten us as to martial law in one's own country and as administered by our military commanders. That is a case the law of nations does not reach. In England Earl Grey assumes that when martial law exists it has no legal origin, but is a mere fact of necessity, to be legalised afterwards by bill of indemnity if there be occasion. I am not prepared to say that under existing laws such may not be also the case in the United States.

After describing the Continental "state of siege" (to be noticed afterwards) Mr. Cushing continues:

A state of siege may exist in a city or a district of country either by reason of the same being actually besieged or invested by hostile force or by reason of domestic insurrection. The 'state of siege' of Continental jurists is the proclamation of martial law of England and the United States; only we are without law on the subject, while in other countries it is regulated by known limitations. Our Constitution, it is true, empowers Congress to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government of the land and naval forces, etc.; but none of these powers have been exerted in the solution of the present question. There is one clause in the Constitution of some apparent relevancy—viz., that the privilege of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it. . . . We have in Great Britain recent examples of Acts to give constitutional existence to the fact of martial law [quoting the Irish Statutes]. These examples show that in the opinion of the statesmen of that country the general existence of the fact of martial law, and its incidental suspension of writ of *habeas corpus*, alike require the exercise of the power of the supreme legislative authority. That idea pervades the constitutional organisation of several States of the Union—Massachusetts, etc. It may be assumed as a general doctrine of constitutional jurisprudence in all the United States, that the power to suspend laws, whether those granting the writ of *habeas corpus* or any other, is vested exclusively in the legislature of each State. How intimate the

relation is or may be between the proclamation of martial law and the suspension of the writ of *habeas corpus* is shown by the particular facts before me. . . . That however, is but one of the consequences of martial law, and by no means the largest and gravest of them, since according to every definition of martial law it suspends for the time being all law of the land and substitutes no law, viz. the mere will of the commander. There may be and have been emergencies of necessity capable of themselves to produce and justify such suspension of all laws and involving for the time the omnipotence of military power. But such a necessity is out of the range of mere legal questions. When martial law is proclaimed under circumstances of assumed necessity the proclamation must be regarded as the statement of an existing fact rather than the legal creation of that fact (*Opinions of Attorney-General*, s. viii., 368-9).

In the American Civil War, for purposes of the war, military districts were created extending over States loyal to the Union and adjacent to the scene of military operations, but not invaded, which by Act of Congress were administered by military commissions; and this authority occasionally clashed with that of the regular Federal Courts, which were open and exercising their functions properly and unobstructedly there. To take one case (*Ex parte Milligan, ante*), a civilian was tried before one of these military commissions in the State of Indiana on a charge of conspiracy, etc., against the United States, and was found guilty and condemned to be hanged. He applied to the United States Circuit Court for Indiana for a *habeas corpus*, showing that his sentence had been approved by the President as to be put in execution without delay, all by order of the Secretary for War, and that during his detention in military custody a grand jury of that Circuit Court had met at the place where he was confined, and sat and adjourned without finding any bill of indictment against him. The Court held that in such a case the commissions had no jurisdiction to try, convict or sentence for any criminal offence a citizen who was neither resident in a rebellious state, nor a prisoner of war, nor in military or naval service; that a citizen not connected with the military service, who resided in a state where the Courts were open and properly exercising jurisdiction, could not, even where the privilege of the writ of *habeas corpus* was then suspended under the power given in the Constitution, be tried or sentenced otherwise than by the ordinary Courts of Law; that he could not be regarded as a prisoner of war, and that the guaranty in the Constitution of trial by jury was intended for a time of war as well as for a state of peace, and could not be interfered with by President, Congress, or Judiciary, except so far as suspending the writ of *habeas corpus* in certain specified cases. The minority of the Court held that the case did not come within the words of the Act of Congress, but otherwise agreed with Chief Justice Chase in the opinion quoted above. Davis, J., however, who gave the opinion of the Court, remarked that "it was not a question of the power to proclaim martial law when war exists in a community and the civil authorities are overthrown, nor a question what rule a military commander at the head of

an army can impose on States in rebellion to cripple their resources and crush the insurrection. Martial law could not arise from threatened invasion: the necessity must be actual and present, and the invasion such as effectually closes the Courts and deposes civil administration: if in a foreign invasion or civil war the Courts are actually closed, and it is impossible to administer criminal justice according to law, then, in the theatre of active military operations, where war really prevails, there is a necessity to provide a substitute for civil authority thus overthrown . . . and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule it limits its duration, for if this government is continued after the Courts are reinstated it is a gross assumption of power: martial law can never exist where the Courts are open and in the proper and unobstructed exercise of their jurisdiction, and it is also confined to the locality of actual war" (see also *McCardle's case*, 1868, Mr. D. D. Field's argument, Forsyth 491).

In an earlier case the United States Supreme Court refused to question the right of the legislature of a State (Rhode Island) to proclaim Martial Law in order to put down a civil insurrection with which its civil power could not cope (*Luther v. Borden*, 1849, 7 How. 1, 45 ff.). Bishop says, "In the extreme circumstances which justify it, martial law may be proclaimed by military commanders, or, as in the Rhode Island rebellion, by the legislature (i. s. 45). The test whether it prevails is whether in case of conflict between the civil and the military authorities the former prevails or not. In New Orleans, when General Jackson in 1814 assumed with his army the control of the city and arrested a person whom a judge thereupon attempted to discharge on a writ of *habeas corpus*, and thereupon arrested the judge and sent him out of his lines and the city, martial law prevailed; but when, after war was over, the judge returned, and in his seat fined the general as for a contempt, the civil power prevailed: the question of the power of the persons administering the national government to declare martial law is not as clear on the face of the Constitution as some others: the judges have no power over it, as the Constitution only gives them 'judicial power': but the power of 'making war,' which belongs to Congress and is executed by the President, would include the right to proclaim and enforce martial law." But Winthrop regards this as "more curious than sound" (*Military Law*, 1886, ii. 40). In *Ex parte Field* (1862, 5 Blatch. 63, 82), a Circuit Court held that the President or Congress had power in the military exigencies of the country to proclaim Martial Law, and as a necessary consequence thereof the suspension of the writ of *habeas corpus* in the case of military arrests: that this was so in Vermont, although distant five hundred miles from the seat of war, and the enforcement of Civil Law had not been interfered with there: and that the President is the sole judge of whether Martial Law shall be proclaimed or not: and in *Ex parte Vallandigham* (1863, 1 Wall. 243), the Supreme Court held that

it had no power to review by *certiorari* the proceedings of military commissioners ordered by a general of the army commanding a military district which had tried a civilian: and see Whiting, *War Powers* (1871, 202, and *Attorney-Generals' Opinions*, x. 74). But the balance of authority in the United States seems to regard the President as having no power to suspend the writ of *habeas corpus* of his own authority; and Congress accordingly, in 1863, passed an Act giving him power to suspend it when in his judgment the public safety might require it during the war. Winthrop comments on the difference between English authorities as to the nature of Martial Law and the extent of military control which it justifies; one view being that it is the application to the citizen of the code of the soldier, the other that it is a discretionary power in the hands of a military commander to be exerted so far as the military necessities of the exigency require; and says that the latter accords more nearly with the American law and practice, by which Martial Law resembles the Continental "state of siege."

État de Siège.—In France Martial Law is regulated by special legislation. The law of August 9th, 1849, provides that it is only declarable in case of imminent peril for internal or external safety; it can only be declared by the National Assembly, and, if this be prorogued, by the President on the advice of the Council of Ministers, who must at once form the commission constituted by Art. 32 of the Constitution, and, if the situation be grave, convoke the National Assembly. The prorogation of the Assembly ceases when Paris is declared in a state of siege, and the Assembly continues or puts an end to it. In French colonies the state of siege is proclaimed by the Governor, but he must give immediate notice to the Home Government. In military places the commandant declares it, and must at once inform the Government. The effect of its declaration is that all the power of the civil authority passes entire to the military with regard to order and justice, but the former continues to exercise the powers left to it by the latter. Military tribunals can take cognisance of crimes and offences against the safety of the Republic, etc. Only the Assembly can raise a state of siege, unless it be prorogued, when the President can do so, as he can in the colonies and military places.

The law of April 3rd, 1878, further provides that a state of siege can be declared in case of imminent peril resulting from foreign war or armed insurrection: only law can declare it and the districts where it is to prevail. If the Chambers are prorogued, the President can declare it on the advice of the Council of Ministers, but the Chambers must meet two days afterwards. If the Chambers are dissolved, and during the time of electoral operations, it cannot be declared even provisionally by the President; except that, if there be a foreign war, he can, on the advice of his Council of Ministers, do so in the territory menaced by the enemy, or on condition of convoking the electoral college and chambers as quickly as possible.

The Governor of Algeria, if its communication be cut off, can declare all or part of it in a state of siege. In the event of the adjournment and dissolution of the Chambers, the Chambers when they reassemble can continue or raise it, and if they disagree it is raised at once. The provisions of the law of 1849 as to colonies and military places are retained, as are all others not inconsistent with the present law (*Roger v. Sore, Lois Usuelles*, 785 [1895]).

UNFAIR COMPETITION IN GERMANY.

[Contributed by JULIUS HIRSCHFELD, Esq.]

Tardiness of German Legislation.—Contrary to its habitually brisk pace, German legislation had until a comparatively recent date been rather lagging behind other nations in the matter of protecting traders against unfair competition. Professor Dr. Kohler, writing fifteen years ago a treatise on the subject of trademarks, and choosing for his motto Senator Lott's dictum,¹ "Honest competition relies only on the intrinsic merit of the article brought into the market, and does not require a resort to false or fraudulent device or token," pathetically exclaimed: "If German jurisprudence would tread the hydra of disloyal competition on the head as vigorously as the English, the Anglo-American, the French, and the Italian do, then will come the time when German industry will raise its head and enter the market as a world power." The learned professor's longing has since then been more than realised—at least as far as the legal aspect is concerned. The Trade-marks Act of 1894, in one or two of its sections, had already foreshadowed the firm determination of the Legislature to check unfairness in competition, and it has been followed by an Act of 1896 dealing with the subject in a truly resolute manner.

The Trademarks Act, 1896: Fraudulent Advertisements.—The predominant feature of the new law is its severe treatment of false and fraudulent advertisements (*Reclame-Schwindel*): "Every person who, in respect of business matters generally, in particular the quality of goods, the mode of their manufacture, exceptional price quotations for goods, or work to be done, the way in which they were bought or the place they came from, the holding of medals, etc., the occasion for or object of the sale, shall, by public advertisements or communications intended for a larger number of persons, make false statements calculated to give the appearance of an especially favourable offer, is liable to an injunction at the instance of any one trading in goods of the same or a cognate kind or of incorporated societies formed for the promotion of commercial interests. Damages may be claimed in cases where the advertiser knew that the representations were false, and damages may also be claimed against editors, publishers, printers, and vendors of periodicals acting *mala fide*. Illustrations calculated to

¹ *Taylor v. Carpenter Cox, American Trademark Cases*, p. 56.

deceive are to be dealt with in the same manner. In addition to such civil proceedings, a *mala-fide* advertiser is liable to a fine not exceeding £75. In case of repeated offences against this Act he may, in addition to the fine, be sentenced to a term of imprisonment not exceeding six months."¹

Employé betraying Secrets.—Another section which may interest² English readers is to this effect: "An employé, workman, or apprentice who during the currency of his employment betrays his master's business or trade secrets in the interest of a competitor, or in order to injure his employer, is liable to a fine not exceeding £150 or a term of imprisonment not exceeding one year. Every person who takes advantage of such communications for the purpose of unfair competition, or who becomes possessed of such knowledge by unlawful or immoral means, is equally punishable."³

Reciprocity towards Foreigners.—There is, lastly, the reciprocity principle as regards foreigners, which is hardly ever absent from modern German enactments.

Agreements with Employés in Restraint of Trade: Time Limit.—In conclusion I may observe that the new German Commercial Code contains a provision whereby an agreement between a master and an employé, stipulating for non-competition on the part of the latter, is only valid for three years after the termination of such relationship.

¹ A few instances culled from theory and practice will give an idea of the scope of this provision: A hosier displaying in his shop-window weaving implements, implying thereby that he is himself the manufacturer of the article he sells; a dealer in amber having in his window illustrations of amber dredging or digging operations implying that he carries on that industry himself; a tobacconist exhibiting representations of American tobacco plantations, whilst only selling German-grown tobaccos;—all these will come within the pale of the law. Other cases are: Misstatements as regards the extent of the circulation of a newspaper; a dentist advertising painless dentistry; a quack safe cure; misstatements as to patent medicines (*Geheimmittel*)—performances in hypnotism or magnetism belong to the same category; a tradesman falsely using the attribute, "by appointment," or misstating the age of his business. Another class of fraudulent representations would be untrue statements that the stock of a bankrupt, goods from a deceased person's estate, or bought at a compulsory sale by auction are being offered.

² I limit myself to such provisions as are foreign to English law.

³ Even an attempt to induce an employé, etc., to betray secrets is punishable. All the offenders are also liable to damages or fines.

THE ENGLISH STATUTE BOOK.

[Contributed by SIR COURTENAY ILBERT, K.C.S.I.]

WHAT is the English Statute Book? What are its contents? Where are they to be found? How are they arranged? What facilities are there for ascertaining the enactments which have been made on a given subject, and the extent to which they are in force? The object of this chapter is to supply an answer to these questions.

Meaning of "Statute."—The word "Statute" is in ordinary English usage treated as equivalent to Act of Parliament, and the English Statute Book might therefore be expected to include all Acts passed by the Parliament of England, or, since the union with Scotland and Ireland respectively, by the Parliament of the United Kingdom. But the Statute Book includes certain enactments which are not, in the strictest sense, Acts of Parliament, and excludes certain enactments which are. When Parliament was first taking shape as a legislative body, laws were made, not by the King, Lords, and Commons in Parliament assembled, but by the king, with the counsel and assent of the great men of the realm; and the legislation of the reign of Henry III., and most of that of Edward I., was the work of assemblies to which the Commons were not summoned. The line between Royal Ordinances and Acts of Parliament is not easy to draw in the first stages of Parliamentary legislation, and some of the most important among the early enactments in the English Statute Book, including the Statute "*Quia Emptores*," would not comply with the tests applied to a modern Act of Parliament. On the other hand, the ordinary editions of the "*Statutes at large*"¹ exclude numerous Acts of Parliament as being either local or private. The line between general and local, public and private, Acts has been drawn variously at different times, and will be referred to hereafter. For the present, the Statute Book will be treated as including only the public general Statutes.

Statutes of the Realm.—The first edition of the English Statutes which was at once authoritative and collective was that commonly known as the *Statutes of the Realm*. The Parliament of 1800 (the Parliament which passed the Act of Union with Ireland) devoted much attention to the condition of the public records, and a Select Committee of the House of

¹ This phrase appears to occur first in one of the Elizabethan editions of the Statutes, that by Barker.

Commons presented a report on this subject on July 4th, 1800. One of the conclusions arrived at in this report was that it was highly expedient for the honour of the nation and the benefit of all Her Majesty's subjects that a complete and authoritative edition of all the Statutes should be published. The report of the committee was followed by an address to the Crown, which led to the appointment of the first Record Commissioners. The Commissioners at their first sitting resolved, "That a complete and authentic collection of the Statutes of the realm be prepared, including every law, as well those repealed or expired as those now in force, with a chronological list of them, and tables of their principal matters." This resolution led to the preparation of the edition entitled, "Statutes of the Realm, printed by command of His Majesty King George III., in pursuance of an address from the House of Commons of Great Britain, from original records and authentic manuscripts." This edition is in nine folio volumes, of which the first was published in 1810, and the last in 1822, and contains the Statutes from Henry III.'s Provisions of Merton (1235-6) to the last year of the reign of Queen Anne (1713). Prefixed to these Statutes, in the first volume, are prints of certain "charters of liberties," including Magna Charta, and an elaborate introduction, which, though superseded on some points by later researches, contains a large amount of interesting and valuable information on the history and condition of the English Statute Law. The introduction gives an account of the former printed collections, translations, and abridgments of the Statutes, and describes the various plans which had been proposed for an authentic publication or for a revision of the Statutes. Then, after a reference to the Charters, it describes the matters inserted in the collection of the Statutes, their arrangement, the sources from which they were taken, and the methods adopted in searching for, transcribing, collating, noting, and printing the text of the Statutes. The editors found much difficulty in determining what ought to be considered as Statutes; and the conclusion at which they ultimately arrived was to include in their edition "all such instruments as have been inserted in any general collection of Statutes printed previously to the edition by Hawkins" (published 1735), "with the addition only of such matters of a public nature, purporting to be Statutes, as were first introduced by him or by subsequent editors, and of such other new matters of the like nature as could be taken from sources of authority not to be controverted—namely, Statute Rolls, Inrollments of Acts, Exemplifications, Transcripts by Writ, and original Acts." Hence the first volume contains not only Royal enactments which are not, strictly speaking, Acts of Parliament, but sundry documents, of which both the authenticity and the claim to be considered as enactments at all are open to much doubt.¹ The Acts down

¹ See, e.g., the remarks on the so-called Statute "De Officio Coronatoris," 4 Edw. I., in *Pollock and Maitland*, Book II., chap. ix., par. 4; and Gross, *Introduction to Select Coroners' Rolls* (Selden Society), p. 25.

to 1489, when the old practice of making up the Statute Roll ceased, are printed in double columns, one column containing the original Latin or Norman-French, the other the English translation, except that for the session of 1488-9 (4 Hen. VII.) both columns are in English, one printed from the Parliamentary Roll, the other from a different version contained in a book formerly kept in the Court of Exchequer at Westminster. The edition was supplemented by two index volumes. The first of these, which was published in 1824, and was called an alphabetical index, contains an alphabetical list of the subjects dealt with by the Statutes comprised in the nine volumes, giving, in connection with each subject, a short reference to the enactments dealing with it. The other, which was published in 1828, though called a chronological index, also proceeds on the basis of an alphabetical list of subjects, but gives under each subject-heading a list in chronological order of the enactments relating to it. It is really an expanded version of the alphabetical index.

Scottish Statutes.—In pursuance of a resolution passed by the Record Commission in 1807, a folio edition of the Scottish Statutes was prepared on lines resembling the English edition of the *Statutes of the Realm*. In order to give further time for consideration of the difficulties connected with the earlier Statutes, it was arranged that the first volume should be postponed. Accordingly, vols. 2 to 11, containing the Statutes from 1424 to 1707, the date of the union with England, were brought out in the years 1814 to 1824, whilst the first volume, containing documents of earlier date, did not appear until 1844.

Irish Statutes.—The Record Commission did not bring out any edition of the Irish Statutes, but an edition of them in twenty folio volumes had been previously printed by the King's Printer-General in Ireland, in pursuance of an order made by Lord Halifax in 1762, when he was Lord-Lieutenant of Ireland.

Editions of Statutes at Large for Period since 1713.—For the period since the reign of Queen Anne no collective edition of the English Statutes, containing repealed as well as unrepealed matter, has been published by authority. Of the editions brought out by private enterprise in the eighteenth century, the most important were those by Serjeant Hawkins (1734-5) and by Mr. Ruffhead (1762-4). These editions were regularly continued by subsequent volumes, and as they were printed from the King's Printers' copies of the Statutes their contents for the period since 1707 may be relied on as accurate; but they omit Statutes which are treated as of minor or transitory importance. Queen's Printers' copies of the nineteenth century Statutes have been published in many forms, and an octavo edition of the Acts of each session is now published by the Stationery Office within a reasonable time after the end of the session.

Chitty's "Statutes of Practical Utility."—The edition most commonly used by practising lawyers is Chitty's *Statutes of Practical Utility*. In this

edition all the Statutes which the profession are considered likely to want are printed with short notes, and are grouped under subjects which are alphabetically arranged. The latest edition, by J. M. Lely, is in thirteen octavo volumes, and is brought down to the end of 1895. A supplemental volume is published every year.

Statutes Revised (First Edition).—The object of the Statute Law Revision Acts which have been passed from 1861 onwards has been to purge away dead matter from the Statute Book, and thus to facilitate the preparation of an edition of the Statutes which should contain only such Acts as are in force. After three of these Acts had been passed, Lord Chancellor Cairns, in 1868, took active steps for the preparation of such an edition by the appointment of a Statute Law Committee to superintend the execution of the work. The result was the first revised edition of the Statutes, the first volume of which appeared in 1870, and which was carried in a series of eighteen quarto volumes down to the end of 1878.

Statutes Revised (Second Edition).—A second edition of the Revised Statutes was begun in 1886, and is to be carried, in sixteen octavo volumes, down to the end of that year. This edition is handier in form and cheaper than its predecessor,¹ embodies the effect of later Revision Acts, and contains in each volume not only a chronological list of the Acts passed in the period covered by the volume, showing how far they have been repealed, but also a full index to the enactments printed in the volume.

Utility of Statutes Revised.—As the utility of these revised editions has been questioned, it may be worth while to illustrate by a few figures the amount of cost and labour which they save. The first edition of the Revised Statutes substituted eighteen volumes for one hundred and eighteen.² The new edition contains, in five volumes, the enactments down to the beginning of the present reign, which occupied seventy-seven volumes of the Statutes at large. There are, indeed, two classes of persons whose needs the revised edition will not fully meet, and, it may be added, was not specially designed to meet. The judge who has to decide, the counsel who has to advise on the construction of an obscure enactment frequently finds it necessary to refer to the language of Acts, sections, or words which have been repealed, either as dead law, by Statute Law Revision Acts, or as superseded law, by amending or consolidating Acts. To the historical student the law of the past is even more important than the law of the present. Both these classes of persons require an edition of the Statutes containing everything that has been repealed, either by way of Statute Law revision or otherwise. But both these classes may derive material assistance from the notes and tables in the revised edition, which show the reasons

¹ The price of each volume is 7s. 6d.

² "After omission of repealed and expired Statutes to a vast amount, the present price of the last edition of the Statutes exceeds the average income of any individual of the labouring classes in England" (Bentham, *Works*, by Bowring, vol. iii., p. 239).

for each repeal or omission. And to the ordinary legislator, official, lawyer, or member of the public, it is surely an immense advantage to have an edition of the Statutes which contains only living law, which is comprised within a reasonable compass, and which may be purchased for a reasonable price.

Irish Statutes Revised.—A revised edition of the Ante-Union Irish Statutes, from 1710 to 1800, comprised in a single quarto volume, corresponding in form to the first revised edition of the English Statutes, was brought out under the authority of the Irish Government in 1888.

Projected Edition of Scottish Statutes Revised.—A revised edition of the Ante-Union Scottish Statutes is in course of preparation.

Annual Volumes of Public General Statutes.—The year 1886 was selected as the termination of the period for the Revised Statutes, because the existing edition of the Annual Statutes begins with the following year. Down to the year 1887 the Annual Statutes were printed and published in different forms and at different prices. But, as from the beginning of 1887, one authoritative edition only of the Statutes is published annually,¹ in an octavo volume, at a cheaper price than formerly, and is edited by an officer paid by the Treasury. Each volume contains an index to the public general Acts of the session to which it relates, and five tables—namely:

- (1) A table of the titles of the public general Acts passed during the session, arranged in the order in which they were passed;
- (2) A table of the titles of the public Acts of a local character passed during the session which are placed among the local Acts;
- (3) A table of the titles of the local and private Acts passed during the session;
- (4) A table showing the effect of the year's legislation on public general Acts; and
- (5) A table of the local and private Acts arranged in classes.

Classification of Statutes.—The system of classification on which these tables are based dates from the year 1868. Under this system the Acts of each session are classified in three groups, each separately numbered:

1. Public General Acts.
2. Local Acts.
3. Private Acts.

The three groups are distinguished by different modes of numbering. Public General Acts have their chapters in Arabic characters (62 & 63 Vict., No. 10); Local Acts in small Roman numerals (62 & 63 Vict., No. x.); Private Acts (if printed) in italicised Arabic figures (62 & 63 Vict., No. 10). The Local Acts of each session, including those which,

¹ The price of each volume of the Annual Statutes in the edition published by authority is three shillings. The Statutes published by the Council of Law Reporting are also printed in the same form by the Stationery Office.

though passed as public Acts, are treated as local, and on that ground excluded from the category of Public General Acts, are printed sessionally in separate volumes. Owing to their bulk and number, the local Acts of each session cannot usually be included in a single volume. Private Acts are not always printed; but a list of those passed in each session will be found in the "Table of the Local and Private Acts arranged in Classes," under the heading "Personal Affairs."

Public and Private Acts: Distinction.—The term "Private Act" in its narrowest sense means an Act belonging to the third of the groups mentioned above. Acts of this class are passed for purely personal objects, such as the extension of powers to deal with land subject to a particular settlement, and each of them contains a provision that it is not to be deemed public. They are now few in number, the necessity for most of them having been superseded by general legislation, such as that which has extended the powers of tenants for life to deal with land. In ordinary usage, however, the term "Private Act" is often employed in a wider sense, as including all measures introduced as private Bills. The former distinction merely affects the mode of promulgation and the arrangement of the contents of the Statute Book. A public Bill when passed may eventually be promulgated and printed as a local Act. But the distinction between public and private Bills is, as will be seen hereafter, much more important.

Every local Act is a public general Act. Before 1851 an enactment to this effect was contained in each local Act; but these special enactments were superseded in 1851 by a provision in Lord Brougham's Act, (13 & 14 Vict., c. 21,) which is now embodied in the Interpretation Act, 1889, (52 & 53 Vict., c. 63, s. 9.) Before 1798 the only distinction in the Statute Book was between public and private Acts. The latter class included not only Acts of a personal character, such as Estate Acts, Divorce Acts, and Naturalisation Acts, but also certain Acts which would be now treated as local—*e.g.* Drainage Acts and Inclosure Acts. But the great majority of the Acts now classed as local were then included among the public Acts. From 1798 to 1868 the Acts printed in the Statute Book were divided into public general Acts and local and personal Acts, according as they originated as public or private Bills. But since 1868, Acts which originate as public Bills, but are of a local character, are not promulgated as public Acts, and are printed among the local Acts.

Public and Private Bills: Distinction.—The distinction between public and private Bills is, as has been said, much more important. A private Bill is a measure for the interest of some person or class of persons, whether an individual, a corporation, or the inhabitants of a county, town, parish, or other locality, and originates on the petition of the person or persons interested.

A public Bill is introduced as a measure of public policy in which the

whole community is interested, and originates on the motion of some member of the House in which the Bill is introduced.

The object of a private Bill is, in fact, to obtain a *privilegium*,¹—that is to say, an exception from the general law, or a provision for something which cannot be obtained by means of the general law, whether that general law is contained in a Statute or is Common Law.

Private and public Bills differ not merely in the mode of origination, but in the mode of procedure for passing them. In the case of a private Bill the rules of the Standing Orders of the two Houses as to the giving of certain notices and the deposit of Bills before a certain date must be complied with, in order that all persons may have notice if their private interests are affected. Each Bill is considered by a Select Committee of each House, who hear the promoters and opponents by counsel, consider their private interests, and determine, in a quasi-judicial capacity, whether the promoters of the Bill have justified their request for a *privilegium*, and whether private interests are properly protected.

The officers of the House and the different Government departments watch private Bills from the point of view of the public interest, and call the attention of the Select Committee to matters affecting that interest. The House of Commons have also appointed a special committee, to which Bills relating to town government are referred, for the purpose of guarding against the insertion of enactments inconsistent with the general law.

Subject to these provisions for the protection of public interests, the proceedings on a private Bill resemble more closely private litigation between the parties interested than a discussion on questions of public policy, though as each Bill has to go through the same stages in the whole House as a public Bill, there is an opportunity for members to raise at those stages questions of public policy in respect of the Bill.

Public Bills are considered mainly from the side of public policy. But when a public Bill affects private interests in such a manner that if it were a private Bill the Standing Orders would require notices to be given, it is called a hybrid Bill, and the practice is to refer the Bill to the examiners of Standing Orders like a private Bill, and to make the Bill proceed in nearly the same way as if it were a private Bill. For instance, it is considered by a select committee in a quasi-judicial capacity, and counsel are heard for and against it. Bills relating to Crown property must, if promoted by the Crown, be dealt with in this way, because the Crown cannot petition Parliament.

The boundary line between public Bills and private Bills, and between the private interests which require a public Bill to be treated as a hybrid Bill and those which do not, is very narrow, and has fluctuated from time

¹ As to the origin and early history of private Bills, see the interesting evidence given by Sir Francis Palgrave before the Select Committee on Public Petitions in 1832 (*H. C. Papers*, 1833, vol. xii., p. 171).

to time. Bills relating to particular localities only are, as a rule, treated as private Bills. But a Sunday Closing Bill for Wales and another for Cornwall were held to be rightly introduced as public Bills. Measures relating to the whole of London are frequently, perhaps usually, dealt with as public Bills, "the large area, the number of parishes, the vast population, and the variety of interests concerned constituting them measures of public policy rather than of local interest."¹ But the practice has not been uniform. The Metropolis Management Act, 1855, which was a public Act, gave certain powers to the Metropolitan Board of Works to borrow money. Other powers of borrowing money were given to that Board, partly by public Acts, like the Thames Embankment Act, 1862, partly by local Acts, dealing with local improvements. In 1869 a general Act regulated the Board's power of borrowing, and from that date till 1888 their powers of borrowing were given annually by a public Act. In 1889 the Standing Orders were altered, and the London County Council now have an annual Bill enabling them to borrow money.

In most towns the buildings and streets are regulated partly by local Acts and partly by the Public Health Acts. In London they have been regulated partly by local Acts—*e.g.* the Acts relating to the city, or Michaelangelo Taylor's Act (50 Geo. III., c. lxxv.). But in 1844, and subsequently, they have been regulated by public Acts. In the session of 1894 a measure for consolidating the building law in London outside the city was introduced and passed as a private Bill, which became law as the London Building Act, 1894 (57 & 58 Vict., c. ccxiii.).

The Thames Conservancy was constituted partly by local Acts, partly by public Acts. In 1894 a Bill repealing all these Acts and reconstituting the Conservancy was passed as a private Bill, and became a local Act (57 & 58 Vict., c. clxxxvii.).

The general rule that where legislation deals with one particular locality only it ought to proceed by way of private Bill, is based on the view that the locality is entitled to be heard quasi-judicially on the provisions of the enactment. For this reason it is unusual to insert in a public Bill a clause dealing with a particular locality. Where, however, special provision for a particular locality has to be made, the rule is sometimes evaded by not naming the locality, but so stating the circumstances that the provision can only apply to the particular locality in question.

In some cases private Bills have been defeated by a resolution of the House that they ought to be dealt with as public Bills. Instances are supplied by the Manchester Education Bill, 1854, the Liverpool Licensing Bill, 1865, and the Keble College Bill, 1888. The Presbyterian Church of Ireland Bill, 1871, was introduced as a private Bill, but was withdrawn in consequence of an objection that the matter ought to be dealt with

¹ *May's Parliamentary Practice*, 10th ed., p. 634.

by public legislation; and a public Bill, which became law as the Irish Presbyterian Church Act, 1871 (34 & 35 Vict., c. 24), took its place.

A consideration of the different precedents and varying practice shows that the boundary line between public and private Bills depends not merely on whether the Bill comes within the Standing Orders relating to private Bills, or does or does not affect a particular locality only, but also on questions of policy, on the circumstances and political questions of the time, and on the general character of the Bill. On the one hand, it would not be right that a measure required by the general public interest on general grounds of public policy should not be passed merely because it is objected to by particular persons or localities whom it would affect. On the other hand, it would not be right that a particular person or locality should be allowed to obtain any privilege inconsistent with what is considered at the time to be true public policy. In some cases it may be convenient that a municipality should be authorised by private Bill to try a particular experiment which is not inconsistent with general public policy. If the experiment is successful, it may be afterwards adopted as a matter of general legislation. Again, there may be cases where the general law will not meet the circumstances of a particular locality. Thus, a law suitable to the great majority of towns may be found inapplicable to the large populations of such places as Liverpool or Glasgow.

It seems therefore impossible to lay down a hard and fast rule as to the subjects which should and which should not be dealt with by private Bills. Certain principles should be observed, such as that a private Bill should not, except for very strong reasons, deal with certain subjects, including the public revenue, the administration of justice, or the constitution or election of local governing bodies. But the boundary line will vary, and ought to vary, from time to time. Circumstances and the requirements of localities change. Old needs pass away and new needs arise. If experiments by private Bills had not been allowed, some of our public legislation would not have taken place. Of course these experiments ought to be carefully watched, and probably there ought to be some special machinery such as the Select Committee now appointed annually by the House of Commons on Police and Sanitary Regulation Bills, for the purpose of determining the cases in which they should be allowed.

As has been said above, experiments in private legislation have often led to public legislation. A good instance is supplied by the Public Health Acts Amendment Act, 1890 (53 & 54 Vict., c. 59), which enables any sanitary authority to adopt various enactments which had been frequently embodied in measures introduced as private Bills.

A very large number of matters which used to be dealt with by private legislation can now be dealt with under the general law. Thus, the Divorce and Naturalisation Acts, which were so common in the last century, are now superseded in most cases by general enactments. Most of the Estate Acts

have been made unnecessary by such Acts as the Settled Land Acts, 1882 to 1890. Amendments of the general company law have removed the necessity for much special legislation about companies, and many matters for which private Bills were formerly required can now be dealt with by the machinery of Provisional Orders.

Provisional Orders' Confirmation Bills.—The Bills to confirm the numerous Provisional Orders now made, under statutory authority, by the Local Government Board, the Board of Trade, and other Government departments, are introduced as public Bills by the Minister in charge of the department which made the order, are referred to the examiners for consideration, and if any of the orders scheduled for confirmation is opposed, it is treated as a private Bill for the purpose of investigation in committee.¹

Public Acts of a Local Character.—Acts to confirm Provisional Orders, and other Acts which, though introduced as public Bills, are considered to be of a local character, are, as a rule, included in the group of local Acts, but distinguished by having the letter "P" prefixed to their number in the group. To this class belong the Acts which are occasionally passed to remove doubts as to the validity of marriages celebrated in particular places of worship.

Chronological Table and Index of Acts.—A chronological table and index of the Statutes is published annually under the direction of the Statute Law Committee. In its latest form this work consists of two volumes, which are arranged for combined use. The first volume contains a chronological table of all the Statutes, showing total or partial repeals; the second contains an index to the subject-matter of the Statutes in force. The chronological table is based on the edition of the Record Commission, known as the *Statutes of the Realm*, as far as that edition extends—namely, to the end of the reign of Queen Anne (1713). Thenceforward it follows Ruffhead's edition (by Serjeant Runnington, 1786) so far as it extends—namely, to the end of the session 25 Geo. III., 1785. From that date, it is believed, all editions are alike. The following extract from the preface to the fifteenth edition shows the principle on which particular classes of Statutes have been included in or excluded from the chronological table :

"The chronological table covers the whole period between the passing of the earliest Statute of the Parliament of England (1235) and the end of the fifth session of the Twenty-sixth Parliament of the United Kingdom of Great Britain and Ireland—namely, the session 62 & 63 Vict., 1899. Ante-Union Acts of the Parliaments of Scotland and Ireland are not comprised in the table. Acts of the Parliament of England extended to Ireland by Poynings' Act, 10 Hen. VII., c. 22 (1), are, in relation to Ireland, treated as Ante-Union Acts of the Parliament of Ireland, with the exception that the repeals of such enactments by the Statute Law Revision (Ireland) Act, 1872, are noted.

"The chronological table comprises all Acts printed in the *Statutes of the*

¹ Standing Orders, House of Commons, 72, 208A, Clifford, vol. i., p. 270.

Reasm, and after the end of that edition all Acts printed by the King's or Queen's Printers as public or as public general.

"Many of these Acts, however, cannot be regarded as public Acts, affecting the community generally, being in their nature special or private Acts, relating to particular persons or places or to private concerns. Acts of this kind are distinguished by the italic entries *Local, Personal, Private*, in the second column of the table (except in a few cases in which they are shown to be not in force); and the table does not profess to show repeals affecting these Acts. Further means of reference to the provisions of these Acts is afforded by the indexes to the local and personal Acts compiled by order of the Select Committee on the Library of the House of Lords, which cover the period 1801 to 1887, and by the classified lists of local Acts annexed to the annual volumes of the Statutes. The second volume of the chronological table gives, as regards all Acts of a public nature, wholly or partly in force, the titles of subject matters under which they are to be found in the 'Index to the Statutes in Force'; and as regards Acts spent or repealed, gives in italic type either the short title of the repealed Act or a general indication of its subject matter."

The index is framed in accordance with instructions prepared by Lord Thring in 1876. It is followed by a series of appendices containing references to various Acts, mainly of a local character, which were printed among the public or public general Acts, but which, for various reasons, it has been considered undesirable to index in detail.

Lists of Local and Private Acts.—Local and private Acts have not been indexed in the same manner or to the same extent as public general Acts. Until 1798 local Acts were not numbered or printed separately from general Acts. It is estimated that the number of Acts of a local, personal, or private character passed before the present century is upwards of eleven thousand, and that upwards of twenty-one thousand Acts of a similar character have been passed during the present century. In 1867 an index, or rather a classified list, of Statutes passed between 1801 and 1865, was published by order of the House of Lords, but is now out of print. It was divided into two parts, the first containing public general Acts, and the second local and private Acts. The second part has been supplemented by additional volumes published in 1878 and 1890. A classified list of all the local and private Acts (including Provisional Orders confirmed by Local Acts) from 1801 to 1899 is now in course of preparation under the direction of the Statute Law Committee.

MODES OF LEGISLATION IN THE BRITISH COLONIES.

(Being answers to a series of questions addressed by the late Lord Herschell—the then President of the Society—to the Secretary of State for the Colonies, to obtain information respecting the common and statute law of the several colonies, the methods of legislation, the publication revision, and consolidation of statute law and matters connected therewith: see Vol. I., New Series, p. 70).

(a) CYPRUS.

[Contributed by A. G. LASCELLES, ESQ., Queen's Advocate.]

I.—COMMON LAW AS THE BASIS OF STATUTE LAW.

(a) *What is the Common Law of the colony? Under what circumstances was it introduced?*

The Common Law in Cyprus, so far as any system of Common Law may be said to exist in the island, is the Common Law of the Ottoman Empire, which is based upon the Sheri or Mohammedan Sacred Law.

The principles of the Mohammedan Common Law, as recognised in the Ottoman Empire, are collected in the Mejlé, or Civil Code, which was compiled by a committee of Turkish jurists in 1869.

The Mejlé, in interpreting the Sacred Law, in most respects follows what is known as the Hanifite tradition.

Mohammedan Law was introduced on the conquest of the island by the Turks in 1571.

(b) *Is there any law applying exclusively to particular races or creeds?*

English Law, which is defined by the Cyprus Courts of Justice Order, 1882, to mean "The Common Law, the Rules of Equity, and the Statutes of General Application which were in force in England on the 21st day of December, 1878," as from time to time altered or modified by Cyprus Statute Law, is applied—

(a) in civil actions where the defendant or any defendant is not an Ottoman subject, and

(b) in criminal matters where the person accused is not an Ottoman subject,

except (1) where the parties agree that their rights are to be determined by Ottoman Law; (2) where it is apparent that the parties intended their

rights to be determined by Ottoman Law; (3) where by any Ottoman Law in force on July 13th, 1878, it is expressly enacted that every person, whether of Ottoman nationality or not, shall be subject to the provisions thereof; (4) in actions relating to immovable property where the rights of the parties are regulated by Ottoman Law as modified or varied by Cyprus Statute Law.

The Mohammedan Sacred Law is applied by the tribunals known as Mekheme-i-Sherié in religious matters concerning persons of the Mohammedan faith. In practice the jurisdiction of these Courts principally consists of matrimonial causes and the administration of the estates of Mohammedans under disability.

The Archbishop of Cyprus has jurisdiction in matrimonial causes concerning persons belonging to the orthodox Eastern Church, and the validity of divorces granted by the archbishop in such matters is recognised in the civil tribunals.

II.—STATUTE LAW.

(a) *Of what does the Statutory or Enacted Law of the colony consist? To what extent is it embodied in Charters, Regulations, Orders in Council, Ordinances, or Acts?*

The Statute Law of the island consists—

(1) of the legislative enactments of the Sublime Porte so far as these were in force in Cyprus on July 13th, 1878.

These enactments are collected in the Turkish work known as the *Destour*, the greater part of which is to be found in a French translation known as the *Legislation Ottomane*, by Aristarchi Bey, and in the modern Greek translation of Demetrius Nikolaides.

In point of form Ottoman legislation may be divided into Charters (such as the Khatti-Sherif and the Khatti-Humayoun), Laws, Firmans, Regulations, and Vezirial Orders and Instructions, all of which derive their authority from the Sovereign, and are equally binding.

(2) Of Ordinances and Laws passed since the British occupation of the island.

From the British occupation to the alteration in the constitution of the Legislative Council which was effected by Her Majesty's Order in Council of November 13th, 1882, the legislation of the island is embodied in Ordinances.

The enactments passed after the new Legislative Council came into existence in July, 1883, are embodied in Laws.

(3) Of Orders of Her Majesty in Council.

The constitution of the Legislative Council, the jurisdiction of the Courts, extradition, and certain other matters are regulated by Orders of the Queen in Council.

(4) Instructions under the Royal Sign Manual and Signet to the High

88 MODES OF LEGISLATION IN THE BRITISH COLONIES.

Commissioner with regard to the transaction of business and the passing of Laws in the Legislative Council.

(b) To what extent do the Statutes of the United Kingdom operate in the colony by virtue of either—

- (i) Original extension of English Law to the colony ;*
- (ii) Express provisions of any Order in Council or Charter ; or*
- (iii) Express adoption by the Legislature of the colony ?*

(i) The extent to which English Law is in force in Cyprus has already been pointed out.

(ii) Except as stated above, the Statutes of the United Kingdom do not operate in the island by virtue of express provisions of any Order in Council or Charter, nor

(iii) By express adoption by the Legislature of the colony.

(c) Is the Statute Law of any other colony in force in the colony ?

No.

(d) Is there any code or other body of Enacted Law of non-British origin in force in the colony ?

As previously pointed out, the Ottoman Law, as it existed in Cyprus on July 13th, 1878, is in force except in certain special cases which are governed by English Law. The Ottoman Law contains the following codes :

- (a) The Mejélé, or Civil Code.*
- (b) The Land Code, based on principles of Mohammedan Law.*
- (c) The Penal Code, based on the Code Napoléon.*
- (d) The Commercial Law, which includes the law relating to partnership, bills of exchange, bankruptcy, merchant-shipping, and marine insurance, and is based on the French Commercial Code.*

III.—METHODS OF LEGISLATION.

(a) By whom are drafts of legislative measures prepared? Is there any official draftsman? If so, by whom is he appointed? To whom is he responsible? and what are his staff and duties? Do his duties extend to measures introduced by private or non-official members of the legislative body?

There is no official draftsman. The Queen's Advocate, who is appointed by the Crown, drafts measures introduced by the Government.

His staff consists of a clerk and interpreter. He is *ex-officio* a member of the Executive and Legislative Councils, and is the legal adviser to the Government. He represents the Crown in the Assize Courts and in the more important civil and criminal proceedings to which the Government is a party.

As a matter of convenience, the Queen's Advocate generally revises measures introduced by non-official members, but it forms no part of his duty to do so.

(b) What is the constitution of the legislative chamber or chambers through

which measures have to pass? If there are two chambers, may measures be introduced in either?

There is only one legislative chamber, known as the Legislative Council, through which legislative measures have to pass.

The Legislative Council consists of the High Commissioner and eighteen members, of whom twelve are elective and six non-elective. Of the twelve elected members, three are elected by Mohammedan and nine by non-Mohammedan voters.

The six non-elective members are such holders of public offices in the island as may from time to time be designated by Instructions under Her Majesty's Sign Manual and Signet or through one of her principal Secretaries of State. These non-elective members hold their places in Council during Her Majesty's pleasure, and may be suspended from the exercise of their functions as members by the High Commissioner.

The officers named as non-elective members by the Royal Instructions of December 14th, 1882, are the Chief Secretary, the Queen's Advocate, and the Receiver-General, and three other holders of public offices, to be appointed by Instruction or warrant under the Royal Sign Manual and Signet or through a principal Secretary of State.

(c) Are draft measures published before introduction or before any other stage? If so, under what rules?

Under the Royal Instructions of December 14th, 1882, drafts of all Laws intended to be introduced are required, except in cases of urgency, to be published for general information in the *Official Gazette* a reasonable time before their introduction.

(d) Through what stages does a Bill pass before it becomes law?

A Bill passes through three stages: (1) The first reading. At the conclusion of the discussion on the introduction of the Bill the chairman puts the question "that the Bill be now read." (2) Committee. If the motion for the first reading is carried, the Council resolves itself into a committee for the consideration of the several clauses of the Bill. (3) After the several clauses of the Bill have been passed in committee, the Council resumes, and the chairman puts the question "that this Bill do now pass."

After a Bill has passed the Council it is open for the High Commissioner to declare his assent (in which case the Bill becomes law), to refuse his assent, or to reserve the Bill for the signification of Her Majesty's pleasure.

The Order of the Queen in Council of November 30th, 1882, reserves to Her Majesty a power to disallow in the whole or in part any Laws passed by the High Commissioner with the advice and consent of the Legislative Council.

(e) Is any opportunity afforded for referring measures, while in course of passage through the Legislature, to any special officer or committee on points of form?

No opportunity is afforded for referring measures while in course of passage through the Legislature to any special officer.

A Bill, at any time after the motion for the first reading has passed, may be referred to a Select Committee, which reports to the Council.

(f) *Have any steps been taken to secure uniformity of language, style, or arrangement of Statutes either by means of a measure corresponding to "Brougham's" Act, 13 & 14 Vict., No. 21, or to the Interpretation Act, 1889, 52 & 53 Vict., No. 63, or by official instruction or otherwise?*

There is a local Ordinance (III., 1879) for defining certain terms in Ordinances and Rules of Court which is to some extent based on Brougham's Act.

The Royal Instructions of December 14th, 1882, contain directions as to the form of the enacting words and the general arrangement and form to be adopted in preparing Laws.

(g) *Is there an annual session of the Legislature? Are there any fixed or customary periods of sessions?*

The Order in Council of November 30th, 1882, requires a session of the Council to be held once in each year, and so that a period of twelve months does not intervene between the last sitting of one session and the first sitting of the next session.

The session generally opens in February or March, and continues for about four months.

(h) *How are the Acts or Ordinances of the colony numbered? Are they numbered by reference to the calendar year or to the regnal year or in any other way? Is it the practice to confer for convenience a "short title" on each Act or Ordinance? How long has this practice been followed?*

The Ordinances and Laws of the island are numbered by reference to the calendar year.

It has been the practice from the British occupation of the island to confer a "short title" upon Ordinances and Laws.

(i) *Are Private Bills (if any) treated separately and under different conditions from Public Bills? On what principle is the line drawn between Public and Private Bills? Are Private Acts or Ordinances separately numbered?*

There is no distinction made between Public and Private Bills.

(j) *Does any practice exist of accompanying a measure on its introduction by an explanatory memorandum?*

There is no such practice. The mover of the first reading of a Bill usually explains its scope and object and the circumstance which led to its introduction.

It is the duty of the Queen's Advocate to report on each Law of the session, and to advise whether the measure is one to which the High Commissioner may properly consent in the name and on behalf of Her Majesty, or whether the Bill should be reserved for the signification of Her Majesty's pleasure.

IV.—PUBLICATION OF STATUTES.

(a) *In what manner and under what authority are Statutes promulgated? What evidence is accepted of a Statute having been duly passed?*

Laws to which the High Commissioner has assented in the name of Her Majesty, and Laws which have been allowed by Her Majesty, are published in the *Official Gazette*.

(b) *In what form or forms, and under what authority, are Statutes printed for publication?*

(c) *Are the Statutes of each Session published in a connected form at the end of the session?*

At the commencement of each year the High Commissioner causes a complete collection to be published, for general information, of all Laws enacted during the preceding year.

(d) *Are the periodical volumes of Statutes accompanied by (1) an index and table of contents, (2) a table showing the effect on previous legislation?*

These volumes contain a table of contents, but neither an index nor a table showing the effect on previous legislation.

(e) *What collective editions (if any) of the Statute Law of the colony have been published, and whether by Government or private enterprise? Are any of them periodical? Do such editions comprise the Acts of the United Kingdom in force in the colony?*

No such collective edition has been published.

(f) *Is there any edition of "Selected Statutes" corresponding to Chitty's "Statutes of Practical Utility"?*

There is no edition of Selected Laws of the island.

(g) *How are the Private Acts published?*

There is no distinction between Public and Private Laws.

V.—REVISION OF STATUTES.

(a) *Have any steps been taken for the revision and expurgation of the Statute Law, whether periodically or otherwise? What machinery (if any) exists for this purpose?*

No steps have been taken for a revision and expurgation of Statutes periodically or otherwise.

(b) *Is there any edition of the "Revised Statutes" showing those actually in force? If so, under what authority is it prepared and published, and what is the date of the latest edition? Is it published at periodical intervals, or how otherwise? Are the contents arranged alphabetically, chronologically, or on any other principle?*

There is no such edition in force in the island.

VI.—INDEXING OF STATUTE LAW.

Is there any general index to the Statute Law of the colony? If so, on what principle is it arranged, and after what interval is it revised? Does it include both Public and Private Acts or Ordinances and the Statutes of the United Kingdom which are in force in the colony? Is it accompanied by any general table showing how each Statute has been dealt with? What is the date of the latest edition?

There is no authoritative index to the Statute Law of the island. An index of the Ordinances and Laws of the island was published in 1896 by the late Major Seager, President of the District Court of Larnaca: it is alphabetically arranged.

VII.—CONSOLIDATION AND CODIFICATION.

(a) What steps have been taken to consolidate the whole or particular parts of the Statute Law or to codify any branches of the Law? Does any machinery exist for the purpose? Is the work now in progress?

No steps have been taken towards a general consolidation of Statute Law; but particular portions of the Law, such as that relating to the administration of infants' estates, have been consolidated.

No portion of the Statute Law which has been enacted since the British occupation has been codified.

Codes of Criminal Law and Procedure have been drafted by Sir W. J. Smith, the late Chief Justice of the island, but have not yet become law.

No machinery exists for consolidation or codification.

(b) What "codes" are now in force in the colony? When and by whom were they prepared, and on what materials are they based?

The only codes in force in the island are the Turkish Codes, which have previously been described.

VIII.—SUBORDINATE LEGISLATION.

What official or other machinery exists for the preparation, passing, or promulgation of measures of subordinate legislation, such as rules or orders made by the Government or a Minister or Department under the express authority of Statute or Ordinance? Is there any, and what, collection of or index to such subordinate measures?

Various Laws authorise the making of rules (1) by the High Commissioner, (2) by the High Commissioner in Council, (3) the High Commissioner with the advice and assistance of the Chief Justice, and (4) by local and other authorities, subject to the approval of the High Commissioner.

There is no collection of or index to such rules.

(b) VICTORIA.

THE Governor of Victoria, Lord Brassey, has been good enough to forward the inclosed memorandum with respect to the methods of legislation in Victoria.

CROWN LAW OFFICES, MELBOURNE.
August 21st, 1899.

I.—COMMON LAW AS THE BASIS OF STATUTE LAW.

As a colony originally founded by British subjects, the Common Law of England is also the Common Law of Victoria (see Tarring, *Law Relating to the Colonies*, 2nd Ed., p. 6 ; Webb, *Imperial Law*, 2nd Ed., p. 4, and authorities there cited).

There is no law in Victoria applying exclusively to particular races or creeds, in the sense in which the enquiry appears to be framed. Special provisions exist as to the immigration of Chinese, and as to their conditions of labour under the Factories Acts.

II.—STATUTE LAW.

The statutory or enacted law of the colony consists of—

(a) Acts of the Legislative Council of Victoria from 1850 to 1855, and Acts of the Parliament of Victoria from 1856 to the present time.

(b) Acts of the Imperial Parliament in force by virtue of the provisions of the Act 9, Geo. IV., No. 83, s. 24, which enacts that "all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith or with any charter or letters patent or Order in Council which may be issued in pursuance hereof) shall be applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively so far as they can be applied within the said colonies."

(c) Legislation of the Imperial Parliament enacted since the passing of the above-mentioned Act, and intended to apply to the Empire generally.

(d) Acts and Ordinances of the Legislative Council of New South Wales in force at the time of the separation of Victoria from the colony, and still unrepealed (see Act 13 & 14 Vict., No. 59, s. 25).

III.—METHODS OF LEGISLATION.

(a) Measures for submission to Parliament are prepared by the parliamentary draftsman under the directions of Ministers. The parliamentary draftsman is an officer of the public service appointed by the Governor in

Council, and attached to the Department of the Attorney-General, to whom he is directly responsible. His duties are to prepare all Government Bills and draft amendments therein. He also, when desired, drafts Bills for private members, and as a general rule all such Bills, by whomsoever drafted, are examined by him, and, when necessary, specially submitted to the Attorney-General or the Premier for his consideration.

(b) The Victorian Legislature consists of the Queen by her representative, the Legislative Council, and the Legislative Assembly established by the Constitution Act (Schedule 1 to the Imperial Act, 18 & 19 Vict., No. 55). The Legislature is designated "The Parliament of Victoria" (Act No. 1075, s. 9). Measures may be introduced in either House, but the great bulk of Government measures are introduced in the Legislative Assembly. S. 56 of the Constitution Act provides that all Bills for appropriating any part of the revenue of Victoria and for imposing any duty, rate, tax, rent, return, or impost shall originate in the Assembly, and may be rejected, but not altered, by the Council.

(c) Draft measures are not published before introduction, but all Bills are circulated to members between their first and second readings.

(d) The procedure on Bills conforms as closely as practicable to the practice of the Imperial Parliament. They are read three times in each House, and are discussed in detail in committee of the whole House.

(e) There is no special machinery for referring measures, while in course of passage through the Legislature, to any special officer or committee on points of form, but measures are sometimes referred to a committee of either House for consideration.

(f) Since 1857 Victoria has had an Interpretation Act (21 Vict., No. 32) similar in character to the Act 13 & 14 Vict., No. 21. Upon the consolidation of the Statutes in 1890 the opportunity was taken to introduce the Interpretation Act, 1890, No. 1058, which embodies certain additional provisions contained in the Imperial Interpretation Act, 1889. Uniformity in language, style, and arrangement is further secured by the fact that all Bills, as already explained, pass through the hands of one official—the parliamentary draftsman.

(g) An annual session of the Victorian Parliament is provided for by the Constitution Act, s. 29. As a rule the Houses meet in May or June, and prorogue before Christmas; but the session occasionally extends into the new year.

(h) S. 13 of the Act No. 22 (now s. 19 of No. 1058) provides that the Acts of the Parliament of Victoria shall be numbered in regular arithmetical series, and that it shall be sufficient to cite any such Act by the number alone, without setting out the title thereof, or the year of our Lord, or of the reign in which the same shall have been passed.

It has been the usual practice, ever since the introduction of Parliamentary Government, to confer a short title on each Act.

(i) Private Bills are introduced only in the Legislative Assembly. The practice of the House with regard to such Bills is substantially the same as that of the House of Commons. The Standing Orders provide that no private Bill shall be brought into the House but upon a petition first presented, which shall be duly deposited with the Clerk of the Assembly and endorsed by the examiners of petitions for private Bills, with a printed copy of the proposed Bill annexed; and such petition shall be signed by the parties or some of them who are suitors for the Bill.

Bills dealing with the following subjects are treated as private Bills :

Charters and corporations, enlarging or altering powers of. City or town, paving, lighting, watching, cleansing, or improving of. Company-incorporating, regulating or giving powers to. Charitable or public purposes, property held in trust for. Church or corporation property, or property held in trust for public or charitable purposes, where no work is to be executed. Ferry. Gas-works. Market or market-place, erecting, improving, repairing, maintaining, or regulating. Powers to sue and be sued, conferring. Continuing or amending an Act passed for any purpose included herein where no further work than such as was authorised by a former Act is proposed to be made. Making, maintaining, varying, extending, or enlarging any aqueduct, archway, bridge, canal, cut, dock, ferry, where any work is to be executed, harbour navigation, pier, port, railway, reservoir, sewer, street, tramway, tunnel, turnpike or other public carriage-road, waterwork.

In numbering Acts no distinction is made between public and private Acts.

(j) It is the usual practice to accompany a Bill with an explanatory memorandum, whenever the nature of the measure seems to require it.

IV.—PUBLICATION OF STATUTES.

(a) All Acts are printed and issued to the public by the Government printer. They are also issued as supplements to the Government *Gazette*, and circulated gratuitously with it to a very large number of Government officials, local governing bodies, and public institutions throughout the colony.

S. 26 of the Evidence Act, 1890, makes all copies of the votes and proceedings of either House of Legislature, if purporting to be printed by the Government printer, admissible as evidence, without proof being given that the copies were so printed.

(b) The Statutes of each session are published in one volume at the end of each session. This volume is accompanied by a table of contents, but not by an index or table showing the effect on previous legislation. It has, however, been the practice during the last few years to publish at the end of each sessional volume an alphabetical index to Acts passed since the consolidation of 1890. This serves as a useful guide to amending legislation. The latest sessional volume also contains a chronological table of the

Victorian Statutes, 1890, and all subsequent Acts, showing how those Acts have been affected by later legislation.

(c) Collected editions of the Statutes of Victoria have been published at intervals of about ten years ever since the separate existence of the colony. They have all been issued under the direct supervision of the Government, but they have not been published at regular intervals. The last publication of this nature was on the occasion of the consolidation of the Victorian Statutes in 1890, to which reference is made below. In this edition one volume is chiefly devoted to the Acts of the Imperial Parliament believed to be in force in Victoria.

(d) An edition of the Statutes, on the lines of Chitty's *Statutes of Practical Utility*, has recently been published by Mr. Louis Horwitz, a barrister and solicitor of the colony. This edition shows all the amendments made in the various Acts up to the time of the issue of the work.

(e) Private Acts are published annually in the sessional volumes in precisely the same way as public Acts, with which, as previously mentioned, they are numbered consecutively.

In the edition of 1890 one volume is devoted to Acts of a private nature.

V.—REVISION OF STATUTES.

The whole of the Victorian Statutes were consolidated in 1890 under the personal supervision of the late Chief Justice Higinbotham. A complete edition of the Statute Law of Victoria was then issued in seven volumes, of which the first five contained the consolidated Acts; the sixth, Acts of a private character; and the seventh, Acts of the Federal Council of Australasia, and Acts of the Imperial Parliament believed to be in force in Victoria. This edition was intended to form part of a scheme which was suggested to Parliament by the Council of the Judges in their annual report in 1887 for the periodical consolidation and publication of the Statutes. The suggestion was referred to a committee of both Houses, which in November, 1889, reported favourably to the project of consolidation, and recommended that a fresh consolidation and publication should take place every ten years.

During the session of 1890 the whole of the consolidated Acts, which had been prepared by the late Chief Justice with the assistance of two members of the Bar, were passed into law.

In the course of consolidation all matter clearly repealed (with the exception of some sections in the Constitutional Act) was omitted.

In accordance with the suggestion of the Council of the Judges, notes upon decisions were made a feature of this publication.

The consolidated Acts are arranged alphabetically and numbered consecutively. An explanatory paper and historical table of legislation are prefixed to the first volume.

VI.—INDEXING OF STATUTES.

(a) Each of the periodical collections of Statutes was accompanied by a general index. The fifth volume of the edition of 1890 contains a complete index to the consolidated Acts. It is arranged on the same principle as the index to an ordinary text-book. The volumes of private Acts and Acts of the Imperial Legislature have each a separate index.

(b) The historical table of legislation referred to in the preceding paragraph gives detailed information as to how each Statute has been dealt with.

VII.—CONSOLIDATION AND CODIFICATION.

(a) The subject of consolidation has been fully dealt with under V, *supra*.

(b) A general codification of the law of Victoria was prepared by the late Dr. Hearn, Dean of the Faculty of Law in the University of Melbourne, and a member of the Legislative Council.

In 1884 a Bill embodying the main features of this codification was passed by the Legislative Council, but subsequently lapsed. In 1887 the code was referred to a Joint Committee of the two Houses, which took the evidence of some of the judges and leading lawyers as to the advisability of adopting it. The late Chief Justice Higinbotham and Mr. Justice Webb, amongst others, expressed themselves as favourable to its adoption.

In 1888 the code was again referred to a Select Committee of the two Houses; but although the Chief Justice again expressed himself as favourable to its adoption, there was a large body of testimony the other way. The committee ultimately reported that the Bill contained too many inaccuracies to be adopted in the form proposed, and they recommended its submission to the best available counsel for revision and correction.

Since then nothing has been done in the direction of a general codification of the law; but the Imperial Bills of Exchange Act, 1882, the Partnership Act, 1890, and the Sale of Goods Act, 1893, which are codifications of the law relating to the subjects with which they severally deal, have been adopted in Victoria.

VIII.—SUBORDINATE LEGISLATION.

Measures of subordinate legislation, such as Rules and Orders in Council, are usually prepared in the Department of the Minister administering the Act by virtue of which they are made, though they are frequently prepared or revised by the Crown Solicitor. They are generally published in the *Government Gazette*. There is no complete edition of or index to them. In the edition of the Acts of 1890 a large number of the rules of a more important and permanent character are appended to the Acts to which they belong.

(c) . CEYLON.

[Contributed by C. P. LAYARD, ESQ., *Attorney-General of Ceylon.*

I.—COMMON LAW.

(a) The Common Law of the island is the Roman-Dutch Law. It was introduced into the Maritime Provinces of the island by the Dutch Government ; and by the Proclamation of September 23rd, 1799, the laws and institutions which subsisted under the late Dutch Government were continued in force under the British Government.

(b) (1) The inhabitants of the Kandyan Provinces (the Central Provinces of the island) retain their civil rights and immunities according to the laws, institutions, and customs established and in force among them at the date of their occupation by the British in 1815 ; but when there is no Kandyan law or custom having the force of law applicable to the decision of any question arising for adjudication, the Roman-Dutch Law is made applicable for the determination of that question by Ordinance No. 5 of 1852.

(2) The Teswalamai, or customary law of the Malabars of Jaffna, as promulgated by the Dutch Government in the year 1707 and referred to in the British Regulation, No. 18, of December 9th, 1806, is in force in the district of Jaffna, a portion of the Northern Province of the island, and in Batticaloa in the Eastern Province of the island, as regards Malabars.

(3) The Mohammedans, whose customs were codified and promulgated by authority of the British Government on August 5th, 1806. This code refers to matters of succession, rights of inheritance, and matrimonial affairs.

II.—STATUTE LAW.

(a) The Statute Law of the island includes Acts of Parliament applicable to the island, Royal Charters, Letters Patent under the Great Seal, Instructions by the Crown to the Governor, Minutes of Council, Proclamations, Regulations, and Ordinances.

The first local legislation was by proclamation under the authority of the British Governor. In 1802 a change in the constitution of the Governor's Council took place, and Proclamations were subsequently issued by "Order of Council" and signed by the Secretary to the Council.

Proclamations were now and then published in the form of "Instructions." From 1805 legislative Acts were passed under the name of Regulations. They were enacted by the Governor in Council. In 1833, however, the legislative power was taken from the Governor's Council and given to a Legislative Council.

(b) The Statutes of the United Kingdom do not operate in the island by virtue of original extension of English Law to the island. Imperial Acts, which by express provision or necessary intendment are applicable to

all Her Majesty's dominions, and Imperial Acts which are applicable to all the colonies, operate in the island. In respect of maritime matters and commercial matters, the Ordinances No. 5 of 1852 and No. 22 of 1866 enact that the English Law should prevail, and thereby the English Statutory Law applicable to those matters has been held to operate in the island.

(c) The Statute Law of no other colony is in force in the island.

(d) No code or other body of enacted law of non-British origin is in force in the island.

III.—METHODS OF LEGISLATION.

(a) Drafts of legislative measures are prepared by the Attorney-General.

Private or non-official members of Council have seldom introduced measures into Council. The Attorney-General has nothing to do with the drafting of such measures.

(b) The Legislative Council, as constituted by Letters Patent dated June 16th, 1877, and Instructions from time to time issued addressed to the Governor of the island under Her Majesty's Sign Manual, consists of official and unofficial members. The official members are the Lieutenant-Governor, if any, of the island, the senior officer for the time being in command of Her Majesty's troops, if not below the rank of captain, the persons discharging the functions of Colonial Secretary, Attorney-General, Auditor-General, Colonial Treasurer, Government Agent for the Western Province, Government Agent for the Central Province, and two other persons holding office in the island, as may from time to time be appointed by Her Majesty; whilst the unofficial members, whose number can at no time exceed eight, are appointed by the Governor subject to Her Majesty's confirmation or disallowance.

(c) Draft measures are usually published, before being introduced into Council, in the Government *Gazette*, but there is no provision of the law nor any rule requiring such publication. Under the Rules and Orders of the Council every measure must be published in at least two consecutive copies of the Government *Gazette*. Before it is committed and printed, copies of it must be sent by the Clerk of the Council to each member three days at least prior to the first reading.

(d) The stages a measure passes through are—

- (1) First reading.
- (2) Second reading.
- (3) Committee.
- (4) Third reading.

Any member desiring to introduce a measure other than a Government one must by the Rules and Orders of the Council obtain leave from Council to do so.

(e) The Rules and Orders provide that all measures, after having passed through the committee stage, shall be referred to the law officers of the

Crown (the Attorney-General and Solicitor-General) for their opinion—first, whether if a law were framed in the terms of the draft referred there would be any legal impediment to its execution by the colonial tribunals; and secondly, if so, by what means, if any, that impediment can be most conveniently surmounted.

(f) The Royal Instructions to the Governor provide that all measures shall be styled Ordinances, and that the enacting words shall be “enacted by the Governor of Ceylon, with the advice and consent of the Legislative Council thereof,” and that Ordinances are to be numbered and methodically arranged, different subjects are not to be mixed in the same Ordinance, and no clause is to be introduced foreign to what the title of such Ordinance imports. The Ordinance No. 1 of 1852 further makes provision for shortening the language used in Ordinances.

(g) There is an annual session of the Legislature. It is customary to open the session two or three months before the end of the year, and to close it shortly before the commencement of the next session.

(h) The Ordinances are distinguished by titles, and the Ordinances of each year are distinguished by consecutive numbers commencing in each year with the number one. It is customary to confer on each Ordinance for convenience of citation a “short title.” This custom has been in existence for over forty years.

(i) There are no Private Bills.

(j) The practice of accompanying an Ordinance by an explanatory memorandum on its introduction does not exist.

IV.—PUBLICATION OF STATUTES.

(a) Promulgation of the Ordinance is effected by publication in the Government *Gazette* and by the enrolment of a duly authenticated copy of the Ordinance in the Supreme Court. The production of the Government *Gazette* containing an Ordinance so published, and any copy of an Ordinance published under the authority of Government, is accepted by the Courts in the island.

(b) Ordinances are printed for publication under the authority of Government in the Government *Gazette*.

The Ordinance is headed—

No _____ of _____ (Year)

(Title : Name of Governor);

and at the foot of it is written—

Passed in Council the (Date)

(Signed) _____,

Clerk to the Council.

Assented to by His Excellency the Governor, the _____ day of _____.

(Signed)

Colonial Secretary.

(c) At the conclusion of each session a collection of all Ordinances enacted during the preceding session is published.

(d) The collection is accompanied by a table of contents and an index ; and since the year 1897 there is also published with each collection of Statutes a table showing the effect of the legislation of the session on previous legislation.

(e) A revised edition of the Ordinance was published in 1872, and a collective edition was prepared by Mr. J. H. Templer, Crown Counsel, in 1894-5, under the authority of Government.

(f) There is no edition of Selected Statutes corresponding to Chitty's *Statutes of Public Utility*.

(g) There are no Private Acts published.

V.—REVISION OF STATUTES.

(a), (b) In 1867 an Ordinance was enacted for compiling a new edition of the Ordinances, and the revised edition of the Ordinances mentioned above was prepared in pursuance of that Ordinance, and published in 1874. Its contents are arranged chronologically. That Ordinance has had its effect, and no machinery exists for further revision of the Ordinances. When Mr. Templer prepared his collection of Ordinances, an Ordinance was passed by the Legislative Council repealing such enactments as had ceased to be necessary, so that Mr. Templer's edition includes all the Ordinances in force up to the date of its being published.

VI.—INDEXING OF STATUTE LAW.

There is no general index of the Statute Law, but from time to time Government publishes the Ordinances in the form of volumes, and to each such volume is attached a list of the Ordinances contained in the volume, and an index to the titles.

To the revised edition of Ordinances published in 1874 there is a general index attached.

VII.—CONSOLIDATION AND CODIFICATION.

(a) In almost every session of recent years consolidating Ordinances have been passed through the Legislative Council, and from time to time Ordinances have been passed codifying certain branches of the law. No special machinery exists for the purpose.

The following Codes are now in force in the island :

(1) The Ceylon Penal Code, enacted in 1883, prepared by Sir Bruce L. Burnside, then Queen's Advocate, and based on the Indian Penal Code.

(2) The Civil Procedure Code, 1889, prepared by the late Sir Samuel Grenier, Attorney-General, and based to a large extent on the Indian Civil Procedure Code.

(3) The Ceylon Evidence Ordinance, 1895, prepared by Mr. C. P. Layard, Attorney-General, and based on the Indian Evidence Act.

(4) The Sale of Goods Ordinance, 1896, prepared by Mr. C. P. Layard, Attorney-General, and based on the English Act.

(5) The Criminal Procedure Code, 1898, prepared by Sir John Winfield Bonser, Chief Justice, Mr. C. P. Layard, Attorney-General, and Mr. P. Ramanathan, C.M.G., Solicitor-General, and based to a large extent on the Indian Criminal Procedure Code.

VIII.—SUBORDINATE LEGISLATION.

(1) No official or other machinery exists for the preparation or passing of measures of subordinate legislation, nor is there a collection of or index to such measures.

(2) Rules, Regulations, Orders, and Bylaws made by the Governor in Executive Council under the authority of Ordinances are prepared in some cases by heads of departments, but generally by the Attorney-General. They are promulgated by publication in the *Government Gazette*.

(3) Rules, Regulations, and Bylaws are also made by local bodies such as municipal councils and local boards under the powers vested in them by different Ordinances, and when made by those bodies are in pursuance of the provisions of such Ordinances submitted to the Governor in Executive Council for approval, and if approved are promulgated by publication in the *Government Gazette*.

(4) Rules are also made by village communities created by Ordinance No. 24 of 1889, and such rules when made have to be submitted to the Governor and Executive Council for approval or disallowance, and if approved are promulgated by publication in the *Government Gazette*.

(d) BARBADOS.

[Contributed by SIR CONRAD REEVES, C.J.]

I.—COMMON LAW AS THE BASIS OF STATUTE LAW.

(a) The colony of Barbados, so far as historical information goes, was founded by British subjects somewhere in 1624-5, and has always been essentially an English possession. By Charter granted to the colony by His Majesty Charles I., confirmed and ratified about 1652 by commissioners on behalf of the Commonwealth of England, it is, amongst other things, declared (Art. 3) "That no taxes, customs, imports, loans, or excise shall be laid, nor levy made on any of the inhabitants of this island without their consent in a general Assembly." And from that period representative Assemblies, elected by colonists possessing the right of suffrage as fixed by

law, have been annually elected and called together, who, with the consent of the Legislative Council, a body nominated by the Crown, and consisting of nine members, have uniformly passed laws for the good government of the colony; and voted supplies to the Crown for carrying on the Executive Government, discharging all other duties and exercising all constitutional rights appertaining to a representative legislative body. Every enactment must receive the assent of the Governor, and the Crown always has the prerogative right of disallowing any Statute, even though assented to by the Governor. One of the earliest Acts on the Statute Book, entitled, "An Act for the Better Ascertaining of the Laws of this Island," is dated March 22nd, 1666. By s. 1 of this Act it appears that Barbados was settled in 1625; and by s. 2 commissioners were appointed to collect all the laws of the island then in force.

The laws in force in the colony are, firstly, the Common Law of England; secondly, such Acts of Parliament as were passed before the settlement of the island, and anterior to the Charter rights conferred as I have stated above; and mainly, of course, the Acts and Statutes passed by the local Legislature. It is accepted doctrine that, in the case of a colony acquired by the occupancy of British subjects, the law of England then in being is immediately and *ipso facto* in force in the new settlement, so far as such law is applicable to the situation and condition of the colony. And I may say in this connection that one of the most salutary of those English Statutes in force without re-enactment, so as to get rid of provisions deemed unsuitable to the circumstances of the colony and which may be found perhaps embarrassing in practice, is the 13 & 28 Eliz., No. 4.

The Common Law of England being the Common Law of this colony in all matters affecting the rights, liberties, and interests of persons and property, our procedure, whether in equity or at law, is substantially the same as it is in the Court of Chancery and in the Common Law Courts in England. I cannot more fully illustrate this than by saying that, in the local law libraries are to be found all the equity and Common Law treatises and text-books, together with the Chancery and Common Law reports from the earliest times, coming down to the latest Law Journal reports and the later law reports. These are cited every day in our Courts by judges, magistrates, counsel, solicitors, and attorneys. Chitty's General Practice, I need not say, covers extensive ground. Addison and Chitty are in constant use in matters of contract and in tort; whilst Jarman is the authority in all proceedings appertaining to the construction of wills. And as I am now mentioning wills, I may at once dispose of one point in connection with that matter, and that is with regard to the law of this island as to the making of wills. By s. 9 of the Statute 1 Vict., No. 26, it is enacted substantially that no will or testament or codicil shall be valid unless it be in writing and signed at the foot or end thereof by a testator, etc.

The Wills Act, to be found amongst our modern consolidated laws, contains almost all the main provisions of the English Statute immediately above referred to. But, with regard to the making of wills, we have stood by the old Statute of Frauds, which was specially copied and re-enacted by the Legislature in 1762. The third section of this Act declares, "And be it further enacted by the authority aforesaid, That from and after the commencement of this Act, all Devises and Bequests of any Lands, Tenements any ways devisable, shall be in writing, and signed or acknowledged by the Party so devising the same, or signed by some other person in his presence, and by his express directions ; and shall be attested and subscribed in the presence, sight, or hearing of the said Testator, by two or more credible witnesses, or else they shall be utterly void and of none effect."

The Wills Act of this island, the short title of which is, "The Wills Act, 1891," at s. 3, in terms re-enacts the above cited provision of the Statute of Frauds, and also contains the following proviso : "Provided always that nothing in this Act contained shall extend or be construed to extend to any last will or testament, devise or bequest, which shall be written throughout in the proper handwriting of the testator or devisor." So that wills of personalty, at any rate, stand upon the same footing as they did in England before January 1st, 1838, whilst holograph papers, shown to be testamentary, are good and sufficient for the devising of real or the disposing of personal estate, without being witnessed or even signed at the end by the testator.

The local Legislature, it goes without saying, has the right to pass any enactments it thinks proper, although those enactments may be in derogation of the Common Law. And no laws passed ordinarily by the Imperial Parliament are in force here unless it is so declared in the Imperial Act, or unless it can be so inferred unmistakably from its provisions. I may illustrate this by saying that certain provisions of the Imperial Merchant Shipping Acts are in force, and so, too, the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., No. 27.

Our Statute Book, however, will be found to contain, as special enactments of the Legislature, the main provisions of many important Statutes affecting real and personal estate, relating to trade, and for furthering the administration of justice, that have been passed from time to time by the Imperial Parliament ; not a few of these being suitable compilations of the original and all amendment Acts, also (if any) relating to the several matters enacted.

In the index to the consolidated Statutes of the colony, published in 1893 after a most careful revision, will be found the short titles of all such Statutes. Amongst them are the Statute of Distributions ; the Act "for the Limitation of Actions and Suits Relating to Real Property and for Simplifying the Remedies for Trying the Rights Thereto," 3 & 4 Wm. IV., No. 27 ; the Conveyancing Act ; the Inheritance Act ; the Dower Act, 3 & 4 Wm. IV., No. 105 ; the Trustees Act, in relation to infants administrators, and

guardians ; the Settled Estates Act ; the Bankruptcy Act ; the Companies Act ; the Bills of Sale Acts, 1878-82 ; the Libel Act (embodying all the latest provisions of the English Statutes on the subject) ; the Abolition of Imprisonment for Debt ; the Fugitive Offenders (Extradition) Act ; the Married Women's Property Act ; the Interpretation Act, 1889, 52 & 53 Vict., No. 63, repealing Brougham's Act, which we had on the Statute Book previously ; and divers other English Statutes, so far as the provisions of those Statutes are deemed suitable to the limited exigencies of the colony.

We have here also, by enactment of the Legislature, a very efficient County Court, or, as we term it, Petty Debt Court Jurisdiction, subsidiary to the Common Law, Equitable, and Probate Jurisdiction of the Supreme Court.

All summary criminal jurisdiction is exercised in this island by stipendiary magistrates alone, styled police magistrates. The island is divided into eleven parishes, and these parishes comprise six districts. Besides exercising a criminal jurisdiction, each magistrate has conferred upon him a limited civil jurisdiction—in debt to the amount of £20, and in contracts and tort to £10. This last-mentioned jurisdiction was brought into existence in the year 1869 by the passing of an Act corresponding in its main provisions to the English Act passed in 1846, and entitled, "An Act for the More Easy Recovery of Small Debts and Demands," 9 & 10 Vict., No. 95.

We have also a Court entitled, "The Assistant Court of Appeal," which was brought into existence in the year 1839, immediately after the final emancipation of the slaves, and, I may say, especially in the interests of the newly emancipated. That Court consists of three judges, being English barristers, and an appeal lies to it, no difficulty whatever being interposed to hamper appeal from all decisions and orders from the stipendiary magistrates in the exercise of their criminal and civil jurisdiction. The Court is empowered to re-hear the case, to examine both parties, to call new witnesses if necessary, and then to pronounce such judgment or to make such order, with or without costs to either party, as to the Court shall seem meet.

Upon this appellate jurisdiction of the Court has been drafted, in recent years, an original jurisdiction in debt and damages up to £50. But the Court is prohibited from adjudicating in any action, plaint, or statement of claim in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage.

Having regard to this prohibition, the Court also has conferred upon it an equitable jurisdiction up to £500, and also a probate jurisdiction where the subject-matter does not exceed £50 in value. I ought to add that an appeal lies to the Chief Justice, who alone presides in the Supreme or Superior Court, from all decisions of law, pure and simple, come to by the Assistant Court of Appeal in the exercise of its appellate jurisdiction,

and also from all decisions, judgments, or orders of any kind come to or made in the exercise of its original jurisdiction.

The Superior or Supreme Court is presided over by a sole Chief Justice, who is judge in the Court of Chancery and in the Court of Common Pleas; which latter Court has, in principle, all the unlimited jurisdiction of the Queen's Bench, Court of Common Pleas, and Exchequer in England, as those Courts were constituted before the passing of the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., No. 66. The said Chief Justice is Vice-Chancellor in Equity and Judge in Probate and Vice-Admiralty proceedings. Legislation in these several departments has not, up to the present time, attained to the point reached by the above-mentioned Supreme Court of Judicature Act. There is no Equity, Common Law, and Probate division. Our Chancery procedure is precisely what it was in England before the passing of the above-mentioned Procedure Act; whilst our Common Law procedure is based mainly and substantially upon the English Common Law Procedure Acts. A suit in Chancery is commenced by filing a bill or petition of claim, and the subsequent proceedings are conducted in accordance with Daniel's Practice, subject to the provisions of our Chancery Acts, altered and amended from time to time, and the rules of the Court. In our Probate procedure we are guided by Williams on Executors, and Browne's Probate Practice.

Civil actions are commenced in the Court of Common Pleas by filing a declaration in the office of the Registrar and serving a copy of it, together with a summons, on the defendant. The several Courts have rules of practice which are substantially copied from the English rules before the passing of the before-mentioned Judicature Act.

The Superior Criminal Court, also presided over by the Chief Justice, has three sittings every year—in April, August, and December. The forms and procedure of this Court are the same as in England, and the Court exercises all the powers discharged by the juries and judges at the Central Criminal Court and at the Assizes. Our criminal code is a substantial re-enactment by the local Legislature of the Criminal Law Consolidation Acts of 24 & 25 Vict. Wherefore, Russell on Crimes, and Archbold's Pleadings and Evidence, with the entire range of criminal reports, are cited and relied upon in all matters brought before the Court by indictment. Here, as in England, the Grand Jury in the first instance find the bills upon which the accused persons are arraigned and tried, in open Court, by the petit jury. I may conclude this paragraph by adding that the Legislature has not yet seen its way to put upon the local Statute Book the Criminal Evidence Act passed by the Imperial Parliament empowering prisoners to give evidence in their own behalf.

With regard to (b)¹ in the same enclosure, I may at once dispose of this by saying that, since the final abolition of slavery in the year 1838 there

¹ "Is there any law applying exclusively to particular races or creeds?"

has been no law here applying exclusively to any particular race or creed. All classes and races of men, provided they be natives or British colonists, stand upon a common platform before the laws and constitution of the colony. All enjoy equal civil and political rights, subject to the provisions and enactments of the law which, in common, affect, regulate, limit, and control those civil and political rights and liberties.

II.—STATUTE LAW.

The only matter which, in my opinion, so far as Barbados is concerned, comes within the purview of this question may be dealt with as follows: Barbados, up to the year 1880, formed one member of the Windward Islands group. This group was, in no correct sense, a confederacy, because, although the Governor-in-chief of these islands resided at Barbados, and discharged certain high executive functions common to them all, each colony had its own Legislature, and, in point of fact, very little was known in the several colonies about each other. There was no common tariff of duties and no common Treasury; and each island had its own independent institutions, civil, criminal, and administrative. For sufficient reasons, no doubt, about the period I mentioned above, Barbados was severed from its connection with the other islands comprising the said Windward group.

In the year 1857, pursuant to authority conferred by Orders in Council on each of the colonies of the Windward Islands, Acts or Ordinances were passed by the respective legislatures bringing into existence a Court of Appeal entitled, "The Windward Islands Circuit Court of Appeal." This Court was made to consist of the several Chief Justices of Barbados, Grenada, St. Vincent, Tobago, and St. Lucia. An appeal was declared to lie to this Court from all decisions and judgments of the respective Chief Justices of the Supreme Courts in the respective colonies. The Court was to be held twice a year, and was to sit in each colony from which an appeal came, no Chief Justice being permitted to sit upon the hearing of an appeal from his own decision or judgment. Barbados, as I have said, was severed from connection with the group; and Tobago, later on, also was allowed to sever its connection, and to become appendant to the colony of Trinidad. The Court of Appeal Act in each colony had to be slightly amended, owing to these respective severances. Although it might seem anomalous, the Windward Islands Circuit Court of Appeal is still in existence, and works, I believe, very satisfactorily to all concerned.

By the express terms of an Order in Council of March 3rd, 1859, it is made lawful for any person to appeal to the Privy Council from any final judgment, decree, order, or sentence of the said Windward Islands Court of Appeal, upon leave being given by the said Court, where the subject-matter of the suit is above the value of £300; and, moreover, it was expressly provided that nothing in the said Order in Council contained

should extend to take away or abridge the undoubted right of the Privy Council "upon the humble petition of any person or persons aggrieved by any judgment or determination of the said Court at any time to admit his, her, or their appeal therefrom. . . ." and to reverse correct or "vary such judgment or determination as shall seem meet."

III.—METHODS OF LEGISLATION.

I now come to s. 3 of the said enclosure.

There is no special officer charged with the drafting of Bills. I believe that I am correct in saying that the clerk of the House of Assembly has always been a qualified solicitor in actual practice; and perhaps for a century—it may be more—this clerk drafted Bills at the request of any member of either House of Legislature who was desirous of bringing in a Bill. Formerly, and indeed up to a comparatively recent date, every Bill was commenced by an elaborate preamble setting out at great length the reasons why the Bill was framed. The enactment part commenced by saying, "Be it enacted by His Excellency the Governor, the honourable members of Her Majesty's Council, and the General Assembly of this island, and by the authority of the same, that;" then follow the several clauses of the Bill.

Up to the year 1881 the House of Assembly had, or at any rate exercised, the right of initiating money votes; but the Legislative Council had no such power, and could only adopt or reject any Bill providing for the expenditure of public money passed by the representative Chamber. But about the period mentioned, in consequence of strong representations from the Secretary of State, a Bill was brought in providing for the establishment of what is called the Executive Committee. This Committee consists of the Governor and his Executive Council—a body, be it understood, entirely distinct from the Legislative Council. The Executive Council has always consisted of the Governor, the officer in command of the Imperial forces, the Colonial Secretary, and the Attorney-General of the island. The Executive Committee Bill authorises the Governor to summon to this Executive Council, on such occasions as he shall deem fit, one member of the Legislative Council and four members of the House of Assembly; they being nominated by the Governor at the commencement of every new session of the Legislature after the election of members to the House of Assembly by the several parishes of the island, the number elected being twenty-four. This Executive Committee, so constituted, settles the estimates, which are laid before the House of Assembly by a member of this Committee having a seat in that chamber, exactly as is done in England by the Chancellor of the Exchequer.

The House of Assembly may refuse to pass any money Bill thus brought in, or may reduce any item; but the House has no power to increase or

to initiate any money vote. The practice has also grown up for the Governor at the opening of the Legislature to mention in his speech what Bills would be introduced at the instance of the Government ; and, practically, all Bills of any importance are now drafted and brought in by the Attorney-General.

It is the practice to print in the official *Gazette* all Bills so brought in, after they have been read a first time ; and they pass through the self-same stages as Bills do which are introduced in either branch of the Imperial Legislature.

Our Statutes, in recent years, are got up and drafted upon the models furnished by the Imperial Statutes.

Formerly every Statute was numbered. But, somewhere in 1890-1, a Commission, consisting of the Attorney- and Solicitor-Generals, was appointed to consolidate and revise the Acts of the island, which were spread over several volumes, owing to alterations and amendments, extending over very many years, which were found necessary, in consequence of the natural change of circumstances ; some of these circumstances being the need felt of adopting from time to time provisions contained in Imperial Statutes.

In the year 1893, the necessary revision and consolidation having been completed, a new and complete edition of the laws was brought into existence, comprised in three thick large octavo volumes, with the excellent index to which I have already referred. Since that time the Statutes passed have been collected at the end of each session of the Legislature and printed in book form for easy reference.

The numbering formerly was in numerical order, numbering on from one to hundreds. But now the practice is reformed. The re-numbering of Statutes was provided for by an Act passed in 1893. Acts are numbered now according to the calendar year, the earliest in the year being No. 1, and so on to end of the year. This numbering is irrespective of the session of the Legislature during which the Acts might have passed.

Very few private Acts are to be found upon the Statute Book. They are in no way classified, but have their place among the Statutes, according to the date of their becoming law.

(e) LEEWARD ISLANDS.

[Contributed by W. H. STOKER, ESQ., *Attorney-General*.]

(Answers to questions put by the Society of Comparative Legislation with respect to the Statute Law of this colony.¹)

I.—COMMON LAW AS THE BASIS OF STATUTE LAW.

All of the islands were acquired by settlement, except Dominica, in the case of which island, by Royal Proclamation made at the Court of St. James's on October 7th, 1763, the existing laws of England were applied to it.

(a) The Common Law of England, by settlement and adoption.

(b) No.

II.—STATUTE LAW.

(a) Imperial Acts applying to the colony, Acts and Ordinances of the federated colony from the time of King William and Mary down to 1798, and by subsequent Acts and Ordinances of the presidencies thereof, both before and after the second federation in 1871, under the Imperial Leeward Islands Act of 1871, 34 & 35 Vict., No. 107, and by Acts of the federated colony since 1871, certain Orders in Executive Council, and Rules and Regulations made under the authority of Acts and Ordinances also have statutory authority.

(b) (i) So far as applicable to the conditions of the colony (See Tarring's *Colonial Law*, 2nd ed., p. 8), by settlement in the seventeenth century, and by adoption, as mentioned in answer to Question I. (a).

(ii) Nothing, it is believed, beyond the Proclamation above mentioned in the case of Dominica. But certain Imperial Statutes since date of settlement apply to this as well as to other colonies. They are set out in Tarring's *Colonial Law*, 2nd ed., chap. 6, p. 233, etc.

(iii) There has been no express adoption of the Statutes of the United Kingdom properly so called, except that by Act. No. 30 of 1877 of the Leeward Islands the Imperial Trustee Act of 1850, as extended and amended by 15 & 16 Vict., No 55, was extended to this colony.

(c) No.

(d) No.

¹ For the text of the questions, see p 86.

111.—METHODS OF LEGISLATION.

(a) By the Attorney-General and two assistants to the Attorney-General. They are the official draftsmen of legislative measures. They are appointed by the Crown, to which they are responsible. One of the assistants resides in the Island of St. Kitts, and is an official member of the Island Legislative Council of St. Christopher-Nevis, and the other resides at Dominica, and is an official member of the Island Legislative Council of Dominica. They usually have charge of the Ordinances in their respective local legislative councils. Their duties do not extend to the drafting or introduction of private or unofficial measures.

(b) Crown Colony: Tarring's *Law of the Colonies*, 2nd ed., chap. 3 s. 1, p. 70, Classes A, B (2). See also Anson on the *Law of the Constitution*, Part II., the Crown, 2nd ed., p. 266, Group B.

Each island legislature now has the Crown Colony form of constitution and since December, 1899, the Federal Legislature has been assimilated in constitution to the island legislatures. Previously to December, 1899, the federated colony of the Leeward Islands belonged to Group B (b) mentioned in Mr. Tarring's book. There is only one chamber in each legislature.

(c) Generally to members of the Council, where practicable. Under Standing Orders and Rules, which are, however, not very rigid on the point.

(d) Passage through Legislative Council, on motions for first and second readings, passage through committee and third reading, Governor's assent, and sometimes proclamation. Sometimes the Act or Ordinance contains a clause suspending its operation until Her Majesty's pleasure is made known. This is so in the case of certain measures of the kind described in the Royal Instructions to the Governor, unless urgent necessity exists for bringing them into earlier operation. In certain cases measures are reserved for the Royal assent. These cases are the same as those where a suspending clause is required, and the Royal Instructions are of the usual kind.

(e) To both standing and special committees, generally, and not merely on questions of form.

(f) Yes. Interpretation of Laws, Acts, and Ordinances have been passed in the federal and island legislative councils.

(g) Yes, and oftener;—in fact, whenever summoned by the Governor, or the Administrator, or Commissioners in the presidencies. The General or Federal Legislative Council usually meets only once a year.

(h) By number and calendar year, according to the time of assent. Yes, it has been the practice for many years to confer a short title on Acts and Ordinances when convenient, but it is not invariably done.

(i) Yes, they are by the Standing Orders and Rules of each legislature, and also under the Royal Instructions. Public advertisement is required of private, but not of public, Bills.

(j) No.

IV.—PUBLICATION OF STATUTES.

(a) Local Ordinances are published or proclaimed, as the case may be, by the Provost-Marshal of the Presidency under the authority of the Governor. Federal Acts are not formally published. The production of the official copy or print.

(b) Singly, and in bound copies. They are obtainable at the office of the Colonial Secretary of the colony.

(c) Yes, in a bound volume containing the Federal Acts and Island Ordinances.

(d) No; only a table containing the distinguishing number and the title of each Act or Ordinance.

(e) There are some ancient collections, but the latest one for Antigua is a volume published by authority in 1865 and compiled under local statutory authority. The preface to this volume, signed by the Commissioners who compiled it, contains useful information as to its contents. One was also compiled in Dominica, and published in 1858, containing the laws from 1763 to 1841. An edition of the Acts of the federated colony of the Leeward Islands from 1872 to 1885 was compiled by Mr. Thomas Baynes, formerly Solicitor-General, and afterwards Puisne Judge, of this colony. It was printed at the public expense and published in two volumes. There are no periodical editions of the laws except the annual copies of the Statutes I have mentioned in answer to Question (c) under this head.

(f) No.

(g) In the ordinary way.

V.—REVISION OF STATUTES.

(a) Yes, Statute Revision Acts and Ordinances were passed in each Presidency in 1892, but none has been passed for the federated colony since its federation in 1871, except No. 6 of 1880, which, however, only deals with Presidential Acts and Ordinances. There is no existing machinery for the purpose.

(b) No, except the editions I have mentioned in answer to Question (c) under Head IV.

VI.—INDEXING OF STATUTE LAW.

There is none beyond that mentioned in answer to Question (e) of Head IV. It should be added that the colony is very poor, and printing alone is a serious consideration. A few years ago a set of Bankruptcy Rules was drafted by a former Attorney-General, but was not proceeded with on account of the expense which would be incurred in

printing it. A short set of rules was passed instead, adopting the English rules so far as applicable, the question of applicability to be decided by the judge.

VII.—CONSOLIDATION AND CODIFICATION.

(a) No systematic steps, but when amending legislation is introduced, consolidation is sometimes adopted when practicable or advisable. No codification has taken place.

(b) No.

(c) None, in the proper acceptance of the term.

VIII.—SUBORDINATE LEGISLATION.

The Clerk of the Executive Council usually prepares the ordinary Governor's Orders in Council, but in cases of difficulty they are usually settled by the Attorney-General. They are published in the official *Gazette*, the production of which is evidence under the Leeward Islands Act, No. 18, of 1890. Rules or Regulations made under statutory authority are usually drafted by the head of the department to which they relate, but are invariably sent down to the Attorney-General for perusal, revision, or settlement. There is no collection of or index to such subordinate legislation, beyond the index to the *Gazette*.

NOTE.—"In the case of this colony the answering of questions of this sort is especially difficult, by reason of the complicated nature and enormous mass of legislation, both federal (at two periods) and local, relating to the Colony and component parts thereof. Each Island Presidency has its own Legislature, in addition to Federal Legislature on certain subjects, and it is often difficult to find out what Statutes are in force and what the law is."—*Note by Attorney-General of Leeward Islands.*

(f) BRITISH ISLANDS IN WESTERN PACIFIC.

I.—COMMON LAW.

(a) In respect of all non-native persons in the British Solomon Islands and Gilbert and Ellice Islands Protectorates, and of British subjects in the other islands and places within the jurisdiction of the High Commissioner for the Western Pacific, the Common Law of Great Britain, under the authority of the Pacific Order in Council, 1877.

(b) The Pacific Islanders' Protection Acts, 1872, 35 & 36 Vict., No. 19, and 1875, 38 & 39 Vict., No. 51.

II.—STATUTE LAW.

(a) Of native Laws framed by the tribal councils, and Queen's Regulations issued under the authority of the Order in Council above cited.

(b) Under the provisions of the Pacific Orders in Council, 1877, s. 22, and 1893, s. 20, the Statute and other Law for the time being in force in England is exercisable within the jurisdiction of the High Commissioner for the Western Pacific, subject to the other provisions of the Orders in Council referred to.

(c) No.

(d) Native Laws are in force in the British Solomon Islands and Gilbert and Ellice Islands Protectorates.

III.—METHODS OF LEGISLATION.

(a) There is no official draftsman.

(b) There is no legislative chamber.

(c) Draft measures are not published before introduction.

(d) Regulations passed under the authority of the Pacific Order in Council take effect after publication in the manner shown below—reply to IV. (a).

(e) Draft regulations may be referred to the chief Judicial Commissioner.

(f) No.

(g) See reply to III. (b).

(h) Queen's Regulations are numbered consecutively with reference to the calendar year of issue. "Short titles" have been conferred on these Regulations since the first one was passed.

(i) All regulations are of a public character.

(j) This practice is not followed.

IV.—PUBLICATION OF STATUTES.

(a) Regulations are promulgated by publication in the *Fiji Royal Gazette*, and by exhibition at the places appointed for the sittings of the Courts held under the provisions of the Pacific Order in Council. Publication in this manner is evidence of a Regulation having been passed. They have effect unless and until they are disapproved by a Secretary of State.

(b) Regulations are printed in the form of the specimen appended hereto, and under the authority of the High Commissioner for the Western Pacific.

(c) } This is not done.
(d) }

(e) No collective editions of the Regulations have been published.

(f) There is no such edition.

(g) See reply to III. (i).

V.—REVISION OF STATUTES.

(a) and (b) The replies are in the negative.

VI.—INDEXING OF STATUTE LAW.

There is no index.

VII.—CONSOLIDATION AND CODIFICATION.

(a), (b), and (c) In the negative.

VIII.—SUBORDINATE LEGISLATION.

Rules of procedure may be drawn up and issued by the High Commissioner, with the assent of a Judicial Commissioner, and under the authority of the Pacific Order in Council. Such rules are promulgated in the same manner as the Queen's Regulations previously referred to, and have effect unless and until they have been disapproved by a Secretary of State.

(g) THE FALKLAND ISLANDS.

[Contributed by THE HON. W. GRAY WILSON, C.M.G., *Governor and Chief Justice.*]

STATUTE LAW OF THE FALKLAND ISLANDS.

I.

By 6 Vict., No. 13, power was given to Her Majesty to make laws for these settlements, and to delegate in whole or in part to any three or more persons within these settlements the powers so vested in Her Majesty.

On June 23rd, 1843, Her Majesty granted a Charter to the settlements, and therein constituted a Legislative Council, but reserved to herself in Council and to Parliament full legislative powers.

The Legislative Council by Ordinance No. 10 of 1853 constituted a magistrate's Court, and conferred upon it the jurisdiction and powers exercised by the Courts of Queen's Bench, Common Pleas, Exchequer, General, Quarter Sessions, Oyer and Terminer and Gaol delivery, Assize and Nisi Prius and Equity and the Prerogative Court of Canterbury, and all the powers of the Lord High Chancellor.

By Letters Patent of February 25th, 1892, these settlements were made a colony, and the power of Parliament to legislate was abrogated.

No law applies exclusively to any particular race or creed.

II.

The Statutes of the United Kingdom operate in the colony by virtue of express adoption by the Legislature of the colony (Ordinance No. 1 of 1898).

III.

Drafts of legislative measures are prepared by the Governor, there being no official draftsman.

The constitution of the Legislative Council is determined by the Letters Patent of February 25th, 1892: four official, two unofficial members.

All Bills are published for one week before introduction, under Ordinance No. 1 of 1898.

Every Bill is read by title three times; and clause by clause in committee of the whole Council, after the second reading.

Every Ordinance takes effect on the day on which it is sealed, unless a contrary intention be expressed therein (s. 2, Ordinance 1 of 1898).

Legislation is not referred, while in course of passage through the Legislature, to any officer or committee on points of form.

Ordinance No. 1 of 1898 is founded on the Interpretation Act, 1889, 52 & 53 Vict., No. 63, but is much fuller.

There is no annual session or fixed periods of session of the Legislature.

Ordinances are numbered progressively from No. 1 in each calendar year.

The first "short title" was conferred in 1886 on one Ordinance only in that year, and upon one in 1887. Since 1888 the majority of Ordinances have had short titles, and since January, 1898, all have had such titles.

Private Bills are treated as Public Bills.

Measures when introduced are not accompanied by an explanatory memorandum.

IV.

(a) The printing at the Government Printing Office or by a duly authorised printer is made (Ordinance 1 of 1898) a sufficient publication and promulgation, and every such publication shall be received as evidence of its having been duly passed.

(b) Ordinances are printed by the Government.

(c) The Ordinances of each session are not published in a collected form.

(d) No periodic volumes are published.

(e) A collected edition of the laws was published by Government in 1884, but Acts of the United Kingdom then in force were not included.

(f) There is no edition of Selected Statutes.

(g) Private Acts are published with Public ones.

V.

(a) No machinery exists for the revision and expurgation of the Statute Law.

(b) There is no edition of Revised Statutes.

VI.

There is no index of the Statute Law.

VII.

(a) The Ordinances are now in process of consolidation by the Governor ; when completed they will be indexed and republished.

(b) No codes are in force.

VIII.

Rules, Regulations, and Orders are as a rule made by the Governor in Council. They are now being revised and consolidated, but there is no collection of them or index to them.

COMPARATIVE VIEWS OF CONTRABAND.

[Contributed by JOHN M. GOVER, Esq.]

Introductory Remarks.—"Contraband" is a term of Italian origin denoting "prohibited goods" (*Contrabbando*, derived from *contra* and *bando*: Low Latin *bandum*, a ban or proclamation.—Skeat, *Etym. Dict.*). Its derivation well indicates its meaning in International Law. By "Contraband of War" is meant goods which, by reason of their hostile nature and destination, are liable to seizure and confiscation by a belligerent even though neutral-owned and carried in a neutral vessel. The Declaration of Paris of 1856, in establishing the principle of immunity of neutral goods in enemy ships and of enemy goods in neutral ships, expressly excepted contraband in each case. In view of the action recently taken by the German Government in regard to the seizure of German vessels in African waters, there appears to be some probability that the whole subject of Contraband and the right of Visitation and Search will, in the near future, be seriously raised with a view to its definition by International Agreement. Meanwhile, like so many other "principles" of International Law, it remains to all appearances a thing of shreds and patches, lacking uniformity and certainty, and constituting a chronic source of danger to the peace of nations.

It is not intended in the present note to attempt any comprehensive survey of the Law of Contraband. Still less is there any desire to assert any personal opinions of the writer as possessing any value whatever in the matter. Exhaustive expositions of the subject have been attempted, with more or less success, on many occasions by jurists of real eminence, though it must be confessed that their value is too often marred by the importation into them of racial bias and national jealousy. The object of the present article is merely to call attention to certain aspects of the subject which it is thought are apt to be overlooked, and to certain considerations, the neglect of which considerably interferes with an accurate conception of the subject.

The Anglo-American and Continental Views of Contraband.—The principle of Contraband of War is a creature of International Law, and of International Law alone. There is no *a priori* rule on the subject to which nations can appeal for guidance. This is really a platitude, but a platitude

too often ignored. Even Continental jurists have at length freed themselves from the fetters of philosophical tradition, which sought for International Law in some vague *Jus Naturæ*, to which all states and all laws were subordinate, rather than in the agreement and actual practice of states themselves. In point of fact the question of what is contraband, and what are the rules governing it, must be determined solely by reference to such agreement and practice.

Is there a unanimity or substantial unanimity of agreement and practice among nations upon the point? If not, or in so far as there is not, then International Law upon the subject is lacking. It is quite true that absolute unanimity is not necessary to make what is substantially a working rule of International Law. The adhesion to a principle of all the greater powers whose interests are affected by it, is no doubt, for practical purposes, sufficient. It cannot be safely asserted that such substantial unanimity exists with regard to the subject of Contraband. But the modern tendency towards the adoption of a common rule is very noticeable.

Among the more recent writers, M. Richard Kleen, in his very able monograph upon the subject,¹ has been at great pains to prove that the practice of nations with regard to contraband has, roughly speaking, followed two main lines: (1) that of Great Britain, and to a less extent of the United States of America, according to which contraband is not strictly confined to arms and munitions of war, but may embrace also "occasional contraband," varying with the circumstances of each case; and (2) that of all or most other states, which absolutely denies the principle of "occasional" contraband altogether, and confines the right of seizure to arms or munitions of war pure and simple. M. Kleen cannot at all events be accused of any bias in favour of this country. He is an extreme instance of the extreme type of anti-English Continental jurist. He at times almost forgets the philosophic calm beseeeming a lawyer, in denouncing Great Britain as the chief stumbling-block in the way of international amity and unanimity. But in doing this he points the moral above mentioned—that there is, as a fact, a want of unanimity among nations upon the subject of Contraband. Whether he is justified in his accusation against this country is another matter. He admits that all the non-English-speaking states have on many occasions in treaties and practice lapsed from the ideal principle of the Armed Neutrality of 1780, and have temporarily deviated into the sphere of "occasional contraband." He also admits that Great Britain has at all events been consistent in her heterodoxy. It would therefore seem clear that, unless the British and American views are to be disregarded altogether, the elimination of the principle of "occasional contraband" from the sphere of International Law cannot be accepted at present. The truth is that the Law of Contraband is still in an evolutionary phase, and there

¹ "Le Droit de la Contrabande de Guerre," in the *Revue de Droit International*, vol. xxv., and published separately by G. Pedone, Paris.

are very many cogent, and some obvious, reasons why the Anglo-American view should merit the very gravest consideration in any future attempt to define the rules on the subject by International agreement. In the process of building up International Law the practice of a majority (even though a large one) of states cannot, merely by reason of being the practice of a majority, lay claim to inherent force and sanction. With regard to the question of the relative weight and value of the Anglo-American and Continental views of Contraband, the following considerations, amongst others that might be mentioned, afford some scope for reflection.

I.—**The Armed Neutrality, 1780.**—The inspiration of the Continental policy of Contraband is to be found in the Declaration of the Armed Neutrality of 1780. Primarily the Declaration was an attempt by the Baltic powers to protect their trade in naval stores and provisions. As Mr. W. E. Hall has astutely remarked, "It was natural that the secondary maritime powers should in time accommodate their theories to their interests." And, indeed, nearly all the states which acceded to the Declaration within a very short time afterwards found it expedient to relapse from the rigid ideal embodied in it. To gauge accurately the value of the Declaration as a *bonâ-fide* attempt to define the rights of belligerents on an equitable basis, it is necessary to scrutinise carefully the history of the Armed Neutrality.¹ The result is not encouraging to admirers of its principles.

II.—**The Peculiar Position of Great Britain.**—Again, it is a curious fact, though sufficiently obvious, that the materials from which the International Law of Visitation and Search, Contraband and Blockade, are almost entirely derivable, are to be found in the history of the great naval wars during and immediately preceding the Napoleonic period. In other words, national policies as to Contraband, and such "International Law" on it as can be deduced from them, took form during that long period when Great Britain had command of the sea, and was at war with half of the civilised world. A divergence of views between our own country and Continental states is therefore not an altogether unexpected phenomenon.

During the present century, and since the Treaty of Vienna, the only wars in which the maritime rights of belligerents have been materially affected have, with two exceptions, been those in which Great Britain was engaged. Even as regards these, owing to the temporary decadence of our own navy or the insignificance of the naval power of our adversaries, very few disputes upon questions such as Contraband and Visitation and Search have in fact arisen. As regards purely Continental struggles, such as the Franco-Prussian, the Russo-Turkish and the Graeco-Turkish wars, for all practical purposes they have added no precedents to the maritime aspects of International Law. In the only two cases in which Great Britain was not engaged and in which serious questions of contraband and capture did arise, one of

¹ See Phillimore, *International Law*, iii. 335, and the authorities there mentioned.

the belligerents was the United States of America ; and in both these cases the United States vigorously asserted the English doctrine of "occasional contraband." In some respects the American view is even a broader one than the British, though it must be confessed that it has the merit (not generally allowed to the English practice by Continental critics) of having been propounded in unambiguous and consistent terms. Mr. Bayard, as recently as 1886, in referring to the inclusion of cotton in the category of Contraband in the Confederate war said, "I apprehend it to be the settled rule of International Law that the question of Contraband is to be determined by the special circumstances of each case."¹

In the war between the United States and Spain, an elaborate list of contraband articles was issued on June 20th, 1898, by the Department of the Navy by way of "Instructions to Naval Officers." This followed very closely the list in our own *Admiralty Manual*, and similarly classified the goods into those (1) absolutely and (2) conditionally contraband. The former included, in addition to arms and ammunition of various kinds, such things as pontoons, "portable range finders," military uniforms and equipments and horses. The latter comprised coal when destined for a naval station or port or for the enemy's navy, railway and telegraph materials and money when destined for the forces of the enemy, and also provisions when destined for the enemy's ships of war or for a besieged place.²

Article 4 of the President's Proclamation of May 9th, 1898, seems also to indicate that coal would under certain circumstances be regarded as contraband.³ In the course of the war, a British ship, the *Ristormel*, was captured and its cargo of coal in fact confiscated.⁴

In the same war the Spanish Government published a decree including in contraband, in addition to arms and ammunition, such things as "uniforms, straps, pack-saddles and artillery, and cavalry equipment, marine engines, and in general all appliances used in war."⁵ It is also worthy of special note that the present Shipping Code of Italy, in defining contraband, does so expressly "subject to special treaties and to special declarations made at the beginning of war." This seems to show a distinct tendency towards the Anglo-American view.

III.—**Inconsistency of the Continental Practice.**—The Continental practice during this century has certainly been far from consistent with the rigid rule of the Armed Neutrality. The most noteworthy deviations into the sphere of "occasional contraband" have not even been justified by the Anglo-American principle of belligerent expediency. M. Kleen, in referring to the well-known rice case, during the Franco-Chinese "state of

¹ See Wharton, *International Law Digest*, s. 373, pp. 7438 and 989: cf. *U.S. v. Dinkelmann*, 92 U.S. 520, and *Young v. U.S.*, 97 U.S. 39.

² *Journal du Droit International Privé*, 1898, p. 1018.

³ See *London Gazette*, May 10th, 1898.

⁴ See *Times*, June 3rd, 1898.

⁵ See *London Gazette*, May 3rd, 1898.

reprisals" in 1885, naïvely defends the French attitude on the ground that it was an "act of retorsion" against England, for refusing to allow French warships to coal in British ports. Apparently this was following the lead of Germany, when in 1870 Bismarck in effect declared coal contraband,¹ "provoked," as M. Kleen says, "by the vacillations of the London Cabinet, against which it was an act of retorsion."

In the greater wars of the last ten years, few of the great European powers have made any clear declaration as to contraband. No reference to it was made in the Neutrality Decrees of France or Russia in the Chino-Japanese war of 1894, the Turco-Greek war of 1897, or the United States-Spanish war of 1898.

It may further be observed that, even as regards "munitions of war," there is no unanimity of opinion and practice among Continental states. No attempt was made to define the expression in the Declaration of the Armed Neutrality, and the ambiguity of the term is certainly accentuated by the fact that, in the latter document, sulphur, and in many subsequent treaties and decrees, other distinctly belligerent articles are mentioned in connection with "munitions of war," but in *separate* terms. For instance, the French "Instructions to the Navy" in 1854 and 1871 add "saltpetre and military equipments, and things made for war and destined for the enemy"; the Italian treaty with the United States of 1871 adds "military equipment and clothing"; and the Russian ukase in 1877 added sulphur and saltpetre. "Munitions of war" is so vague and elastic a term as almost to admit within its scope all articles which the Anglo-American view treats as "occasional contraband." An examination of the full list of articles stated to be "absolutely" or "conditionally" contraband in Mr. T. E. Holland's *British Admiralty Manual of Prize Law* (1888), indicates how easily the inclusion of almost every item might, at any rate, be justified by adopting the French test of 1854 and 1871.

IV.—**Practice of States in Recent Times.**—In an attempt to arrive at a conclusion as to the maximum extent to which there can be said to be community of view between modern states with regard to the nature of contraband, it is very necessary to confine attention to the *most recent* declarations or practice of each state.

To rely too much upon traditions of the Armed Neutrality, or of the Napoleonic wars, is entirely misleading. It is equally unsatisfactory to treat the opinions or *obiter dicta* of theoretical jurists, however eminent, as any definitive indication of actually existing Law. This, it is submitted, applies not merely to isolated text-books, but even to the resolutions of the Institute of International Law. It is owing to an undue regard for ancient history and the opinions of writers, that so many text-books, and particularly Continental ones, are, as expositions of concrete International Law, somewhat stale and unprofitable. The opinions of eminent International jurists, like

¹ See *Wharton*, s. 369.

those of writers upon the National Law of any particular state, have no inherent force, and do not *make* Law. They are valuable only in so far as—*first*, they expound the actual agreement or practice of states which go to make up the Law, and *secondly*, they may influence particular Governments in deciding as to the policy or practice which their states shall adopt. It is for the reasons mentioned, and not from any want of respect for the individual views of jurists, that for the purpose of the present article such views are not appealed to as direct authorities upon the matters in question.

The real rules of International Law recognisable at any given time can only be deduced from an examination and comparison of

- (a) joint International declarations or treaties, such as the Declaration of Paris, 1856, the Geneva Convention, and the Final Act of the African Berlin Conference ;
- (b) more limited compacts or treaties between particular states ;
- (c) decrees or pronouncements by the Governments of particular states ;
- (d) diplomatic correspondence between particular states ;
- (e) decisions of Prize or other Courts of particular states ;
- (f) decisions of International Courts of Arbitration ; and
- (g) the actual practice *in recent times* of each state.

Having regard to these, and to these only, considerable light is thrown upon the subject of Contraband by a consideration of the *modern* attitude of nations. It is sufficient for present purposes to refer only to the Great Powers of Europe and the United States of America. While doing so, it is only reasonable to attach special weight to the position of those states which may more particularly be called great naval or maritime powers—*i.e.* the United States, Great Britain, Germany, France, and Italy.

Of these, the modern attitude of the *United States* and *Great Britain* has been already referred to in detail.

The modern view of *Italy* is best defined in the article in its Shipping Code above mentioned ; and the most recent interpretation of this is to be found in the decision of the Italian Prize Court in 1896 in the *Doelwyk* case, particulars of which are given later on in this article.

As regards *France*, the wide terms of the French "Instructions" in the Crimean and Franco-German wars have already been alluded to. These and the Rice decree of 1885 denote a policy very far removed from the strict limitations of the Armed Neutrality.

Russia's position as a naval and mercantile power is of very recent date. But it must be confessed that she has adhered more closely to last century's traditions than any other state. The ukase of 1877 confined contraband to "munitions of war," sulphur and saltpetre, and at the African Conference of 1884 Russia strenuously protested against the inclusion of coal under any circumstances.

Austria-Hungary is by physical conditions little interested in maritime

matters. In 1870 the Government decree was couched in vague terms, and forbade subjects to carry to belligerents "articles reputed contraband by International Law, or by the ordinances published by belligerent governments." This is certainly open to construction as a departure from the strict eighteenth-century view.

With regard to *Germany* we have the advantage of a very recent pronouncement upon the subject. On January 19th, 1900, Count von Bülow made a declaration in the Reichstag in connection with the seizures of German ships in South African waters. It indicates a distinct advance on the part of the German Government beyond the traditional Continental view of contraband.

The sixth principle enunciated was as follows :

Contraband of war is only goods or persons *adapted for the purposes of war* and at the same time destined for one of the belligerents. What kind of goods can be regarded as contraband according to the above definition is a disputed question. *Apart from the case of arms and ammunition*, this question will as a rule be capable of decision only when every circumstance of a particular instance is taken into account, unless a belligerent has duly and expressly intimated to neutral Powers the nature of the articles which it intends to treat as contraband, and the neutral powers have raised no objection.¹

Tendency to enlarge the Scope of Contraband.—The conclusion to be drawn from this short survey of the modern attitude of the Greater States is very striking. A very marked tendency is evinced on the part of all the Continental Powers, except perhaps Russia, towards an extension of the conception of contraband in the direction of the Anglo-American view. Upon the other hand, there is some ground for saying that both Great Britain and the United States have in modern times shown an inclination to recede from the extreme application of their view which occasionally prevailed a century ago. It is exceedingly doubtful whether there is now, at bottom, any really serious divergence between the English and the Continental views. The doctrine of "occasional contraband," as advocated now by the two countries, has lost that element of "*capriciousness*" of which Continental jurists have always, perhaps with some justice, accused it. Neither Great Britain nor the United States now claims, even if either ever claimed (which, except in the minds of Continental jurists, is doubtful), the right of a belligerent to make anything contraband which he chooses. The Anglo-American claim is simply that anything which under special circumstances is in fact useful and adaptable for the purposes of the other belligerent's hostile operations, becomes in such event contraband, and can be treated as such. It is unlikely in the future that it will ever be employed to cover the case of articles such as provisions, except when they are really "adapted for the purposes of war." If the doctrine is thus limited, it seems

¹ See *Times*, January 20th, 1900.

difficult to see how it seriously conflicts with Continental views and practice, and how European powers can reasonably object to it.

One thing at all events seems clear. It is impossible in modern times to strictly adhere to any fixed category of contraband articles. From the very nature of things any such category must necessarily be open to expansion with the changing conditions of war and commerce. Inventions from time to time in the shape of new weapons and explosives; the rapidly altering methods of fighting on land as well as on sea, so clearly illustrated in the present South African war; and the great improvements in transport and commissariat arrangements, all tend to make the old limited doctrine of Contraband as out of date as its sponsor, the Armed Neutrality. Force of circumstances, in spite of the protest of many eminent jurists, seems to be tending towards the universal adoption of a rule more in harmony with the Anglo-American than with the Continental doctrine. Perhaps the greatest impetus of all in this direction will prove to be the increase of naval power which seems imminent among the Continental states. Hitherto the benefit of the belligerent rights of visitation and search and capture of contraband has been experienced almost exclusively by Great Britain, in consequence of her pre-eminent command of the sea. When this predominance ceases to be so marked, it may be that other states will find that their own experience of belligerent rights at sea will lessen their former bias in favour of restricting such rights. At the same time, it is to be observed that the rules of Search and Contraband are at bottom a compromise between belligerent and neutral rights. "Neutrals," as an American diplomatist well expressed it, "have a right to carry on their usual commerce, and belligerents have a right to prevent them from supplying the enemy with instruments of war."¹ At present such "right to prevent" is sanctioned by the liability of the ship or cargo to confiscation. But it is possible that in the future the subject may become one of Neutral State liability to actively prevent subjects from exporting "contraband" goods. The *Alabama* affair and the English Foreign Enlistment Act of 1870 were certainly steps in this direction, and it is not inconceivable that an extension of the principle embodied in them may shift the question of contraband into a different plane altogether from that which it now occupies.

The Recent Seizures near Delagoa Bay: (1) The Provision Question.—

The recent controversy with the Governments of the German Empire and the United States with regard to seizures of ships by British vessels in South African waters has raised acutely several most interesting questions.

With regard to the United States, little need be said. The older historical cases in which provisions have been seized by a belligerent are too familiar to need comment. In spite of the British and French "Provision Orders" of the Napoleonic wars, and of the adoption of the principle involved in particular treaties of many states, it would certainly

¹ See *Wharton*, s. 370.

seem now to be quite out of date to recognise provisions under ordinary circumstances as contraband or quasi-contraband. It is obviously not to the interests of this country to do so—nor, in view of Lord Granville's protest to France in the rice case of 1885, could we consistently claim to adopt such a practice. In extreme cases it would no doubt be permissible. The *British Admiralty Manual* suggests that this would be so where provisions and liquors are "fit for the consumption of the army and navy" of a belligerent. This is not very happily expressed.¹ The conditions were better stated by the American courts in *The Commercen*, 1 Wheat, 382,—i.e. "if destined for the army or navy of the enemy or for his ports of naval and military equipment."² The observations of the United States minister at Berlin, with regard to the French rice seizures, in 1885, are of great interest on this point.³ It seems only necessary to add that the recent seizure of American foodstuffs on board the *Mashona* and *Maria* could not reasonably be justified. It is understood that the British Government have frankly expressed regret, and have offered explanations satisfactory to the American Government, so that the incident is happily closed. The ships seized were released, and one at least of them has since discharged its cargo at Lorenzo Marques.⁴

(2) *The Doctrine of Ultimate Destination*.—With regard to one of the vexed questions in relation to contraband, the situation created by the present South African war is almost unique. The Transvaal and Orange Free State are peculiar in having no seaboard and consequently no ports in their territory. The only means by which foreign goods can be imported into them is, for all practical purposes, either by way of British territory or through Delagoa Bay, which is Portuguese, and therefore neutral, territory. Neither of the Republics has any naval or even mercantile marine. So far as is known, no ship purports to fly their flag, and if it did so it is probable that such flag would not under the circumstances be recognised.⁵ Again, Delagoa Bay being a neutral port cannot be blockaded. One consequence of these facts is that in the exercise by British cruisers of the right of Visitation and Search two of the *raisons d'être* of such right—i.e. the possibility that an ostensibly neutral ship may in fact be an enemy one, or that it may be bound for a blockaded port—have been absent.

The result has been that the only available object of Visit and Search in the present war has been to prevent contraband being carried to the enemy, and there seems some reason for saying that this circumstance has rather

¹ Compare the Admiralty Instructions in the case of the seizure of the *Hersog*. They are much better expressed. See *Parliamentary Paper* (Africa), No. 1, 1900, Letter No. 39 and inclosures.

² Compare the United States "Instructions" of 1898, quoted above.

³ See Wharton, *Digest*, s. 370.

⁴ See *Times*, January 21st, 1900.

⁵ Compare as to this the curious case of the *Palme* in 1871: Dalloz, *Jurisprudence Generale*, Part III., p. 94.

tended to bring into more than usual prominence the searches and seizures which have actually taken place. Add to this the comparative unfamiliarity with the subject consequent upon the infrequency of serious naval wars in recent years, and the unfortunate results which have in fact attended the seizure of German ships, and the chorus of resentment in the Continental press is at all events to a slight extent accounted for.

The most interesting question, however, which has arisen from the peculiar conditions above-mentioned relates to what is commonly called the doctrine of "Continuous Voyages." The phrase in the present case is inapt, but the principle is the same as in the famous cases which arose in the American Confederate War of *The Springbok*, Blatchford Prize Cases 349, 5 Wallace 1; and *The Peterhoff*, 5 Wallace 35. The doctrine as laid down in these cases has been the subject of much discussion and criticism by jurists.¹ The principle underlying it is well expressed by Fiore (French edition by Antoine 1886, vol. iii., s. 1649) thus:

Contraband goods destined for one belligerent may be seized by the other belligerent when found on a neutral ship sailing between neutral ports, *if it be plain that the intention was to supply the goods to the former belligerent.*

The doctrine is really a simple one, and by no means startling. The difficulty of it really lies in applying it. Unless the *mens rea* is very clearly proved in each case, the doctrine would no doubt become a dangerous one, and might well provoke serious friction.

The question arises whether it can be taken as representing an actually accepted rule of International Law. At present it cannot be safely asserted that this is the case. At the same time, when the question of Contraband is closely examined, it seems difficult to see how any state can well object to the rule in the abstract, though there may be some dispute as to the proper mode and conditions of applying it.

It is generally recognised that the essence of Contraband is twofold. As Professor T. E. Holland concisely expressed it in a recent letter to the *Times* (January 2nd, 1900), "Contraband implies (1) that the goods are fit for hostile use, (2) that they are on their way to a hostile destination." The Italian Shipping Code, referred to below in connection with the *Doelwyk* case, recognises the latter condition as essential. So the recent German declaration mentioned above says that contraband must be "destined for one of the belligerents." Indeed, the point is well settled.

What is Destination?—But the question is what is meant by "destination"? Is it the port to which the goods are immediately or ostensibly consigned, or is it the place to which or the person for whose benefit and into whose hands the goods are *really* intended to *ultimately* come? It would obviously be unfair to a belligerent, and inconsistent with any

¹ See Wharton, *International Law Digest*, iii., s. 362, where most of the different views are cited.

system of so-called Law, whether International or otherwise, to be satisfied merely with the ostensible or apparent destination of contraband goods, without venturing to ascertain whether it is also the real destination intended by the owner. To thus limit a belligerent's rights would be to stultify the Law of Contraband altogether. It would be sufficient for all contraband goods to be labelled and addressed to a completely innocent destination in order to free them from all risk of capture.

This is what actually happened in the Italian case of the *Doelwyk* in 1896. The facts as to this interesting case are admirably and fully stated in an article by M. Giulio Diena in the *Journal du Droit International Privé* for 1897, pp. 268 *et seq.*; and another by M. Prosper Fedozzi in the *Revue de Droit International*, vol. xxix., pp. 55 *et seq.* The case also indirectly came before our own Courts in *Ruys v. Royal Exchange Assurance Corporation*, L.R. [1897] 2 Q.B. 131.

The facts were, shortly, as follows: A Dutch ship, the *Doelwyk*, sailed from Rotterdam on May 17th, 1896, ostensibly for Kurrachee in India, with a large cargo of rifles and ammunition. Italy was then at war with Abyssinia. The ship was seized by Italian cruisers in the Red Sea, as she was bearing towards the French port of Djibouti, with the avowed purpose of disembarking one passenger there. She was taken to Massowa, and ultimately the Italian Prize Court decided that the capture of both ship and cargo was justifiable on the ground that the latter was contraband of war. The ship and cargo were in fact released because Peace had since been made; but the Court dismissed the owner's claim for damages. The evidence clearly showed that the cargo was really destined for the Abyssinian army, and was intended to be unloaded at Djibouti, and from thence transmitted by land to its ultimate destination. The Court refused to admit that the fact of the final transit being by land instead of by sea affected the question. In this respect, it will be observed, the case resembled the *Peterhoff*. The decision of the Italian Court was based on the provisions of the Italian Shipping Code, which must be taken to represent the Italian view of the rule of International Law on the subject. Article 215 of this Code provides that "neutral ships, laden wholly or in part with contraband, and destined for an enemy country, shall be captured. . . ." It is worthy of remark that the Dutch Government made no protest against the seizure or the judgment. The case is most interesting as being the first one in which the doctrine of "continuous voyages" has been raised since the *Peterhoff* case.

The "Bundesrath" Case.—With regard to the seizures of German ships during the present war with the South African Republics, the circumstances have been almost precisely similar. The *Bundesrath*, *Herzog*, and *General* were seized by British cruisers off the South-East Coast of Africa, and were bound for Delagoa Bay. They were brought into Durban for examination, on suspicion of having on board contraband destined ultimately for the Boer armies. The suspicion proved unfounded, and

the ships were released.¹ This fact does not, however, affect the principle involved.

One conclusion to be drawn is, that the British Government has adopted finally the doctrine of "continuous voyages," or as it might more correctly be called, the doctrine of *Ultimate Destination*. It has therefore made, and, it would seem, properly made, an advance upon the principle laid down more than thirty years ago by its own Courts in *Hobbs v. Hemming*, 17 C.B., N.S. 791. It also seems to be beyond doubt that the German Government has acquiesced in the principle. From the negotiations which have occurred relative to the seizures, and from the pronouncement by Count Bülow in the Reichstag on January 19th last, it is clear that the objections raised by Germany with regard to the seizures were solely concerned with the fact that the latter were effected on inadequate suspicions and in an inconsiderate manner, and not with the fact that the ships were bound to a *neutral* port. It is to be observed, however, that, owing to no contraband being discovered on board, the question in all its aspects did not arise. If, for instance, Mauser rifles had been found on board in large quantities, but ostensibly consigned to a *neutral* subject living at Lorenzo Marques, it is interesting to speculate as to whether the German Government would have acquiesced in their confiscation. It is clear that upon the *Springbok* and *Doctwyk* principle, if the evidence sufficiently showed that the goods were ultimately destined for the Boer armies, such confiscation would be justifiable.

There seems, however, some reason for saying that the British authorities acted altogether too hastily in capturing and unloading the *Bundesrath* and other vessels. At the same time, if the statements contained in a letter in the *Times* of January 20th with regard to Samoa are reliable, an interesting light is thrown upon German methods in similar circumstances.

Attitude of the German Government.—With regard to the general position taken by the German Government in relation to Contraband, it appears that, in the course of the recent negotiations, the British Government was invited to give its assent to the wide principle that "*neutral goods carried on a neutral ship between neutral ports are not contraband.*" This was of course refused, and it would seem that the German Government regarded the proposition rather as a starting-point for further negotiations than as a serious statement of its own views.

Ultimately it propounded a series of six principles purporting to be "based on German naval and legal authorities." The fourth of these, broadly defining contraband, has been above referred to. The other five are not open to much criticism. They were as follows :

1. "Neutral merchant vessels on the high seas or in territorial waters—
apart from the right of convoy, which does not affect cases in point—are

¹ *Times*, January 17th.

subject to the right of visitation on the part of ships of war of belligerents. This undoubtedly holds good as regards waters which are not too far distant from the seat of war. At present there are no special agreements with reference to mail steamers.

2. "The right of visitation must be exercised as considerably as possible, and without unnecessary annoyance. The proceedings may be divided, according to circumstances, into two or three acts: stopping the ship; examining the papers; searching the ship. The first two of these acts can be carried out at any time without further ado. If they afford grounds for suspicion the ship may be searched.
 3. "If the neutral vessel has offered resistance when it is being stopped, or if an examination of its papers reveals irregularities, or if contraband is discovered on board, the ship-of-war of the belligerent may take the neutral ship into port in order that the matter may be examined and decided by a competent Prize Court.
- * * * * *
5. "If contraband is found it may be confiscated, but it depends upon the circumstances of each case whether indemnification is to be granted or not.
 6. "If it was unjustifiable to take the vessel into port the belligerent state is bound to set the ship and its cargo at liberty without delay, and to give complete indemnification."

The six principles enunciated by Count von Bülow are, of course, in no sense exhaustive, but they might well serve as the text for more elaborate international discussion upon the subject.¹

¹ Since this article was in type and too late for purposes of reference, the *Correspondence respecting the Action of Her Majesty's Naval Authorities with regard to certain Foreign Vessels* has been published as a parliamentary paper (Africa, No. 1, 1900). It appears that the German Government did not finally acquiesce in the *Ultimate Destination* principle, but "reserved to themselves the right to raise the question in the future."—J. M. G.

THE TEACHING OF LAW IN FRANCE.

[Contributed by THOMAS BARCLAY, ESQ.¹]

Introductory Remarks.—In venturing to address your honourable body on the subject of legal education in France, I must express my regret that I am unable to make any comparisons from personal knowledge with the condition of legal education in the United States. I hoped had I been able to address you in person, to cure that defect by a visit to one or more of your law schools. If I then speak of American schools, I do so subject to correction.

Law teaching according to English ideas is necessarily associated with the organisation of the legal profession. In England, as you know, the two branches of the profession are still distinct. The barristers obtain their professional education under an arrangement, entered into among the four corporations known as Inns of Court, into which they are divided. By this arrangement lectures are provided for the students, though they are little attended by them, and qualifying examinations are held in the chief branches of the law preliminary to admission to practice in the Courts. A Corporation of Solicitors also provides lectures and examinations, which, combined with compulsory clerkship in practising solicitors' offices, qualify for the exercise of the solicitors' branch of the profession.

Apart from the professional studies and examinations, we have law classes at our universities where some law is taught, but generally without reference to practice, and degrees in law are granted which the Inns of Court recognise only to a limited extent.

I gather from the synopsis published in your most interesting *Report on Legal Legislation* of 1893 that, apart from the fusion of the two branches of the profession, legal education is in much the same condition in the United States as in England—that is, with a few exceptions, the law studies and examinations are expressly directed to the training of Court practitioners, whether counsellors or attorneys, the exceptions being that some special lectures are provided by certain universities on Roman law, general jurisprudence, and international law which have no reference to any professional course.

¹ A paper read before the American Bar Association at Buffalo, U.S.A.

In France the system is totally different.

Branches of the Legal Profession in France.—There the legal profession is divided into a great number of different branches. There are *avocats* admitted to plead before the Courts, *avocats* not admitted to plead before the Courts; *avoués* who have the monopoly of the procedure in Courts of First Instance; another set of *avoués* who have the monopoly of the procedure in the Appeal Courts, and a third class who combine the functions of *avocat* and *avoué* before the Court of Cassation. There are notaries who have the legal monopoly of drawing certain deeds and of delivering certified copies of documents of all kinds, and who, through this partial monopoly, have practically drawn all the conveyancing into their hands; there are *huissiers* who have the monopoly of process-serving of all kinds, including certain functions of notaries public in Anglo-Saxon lands; there are *agréés*, who have the monopoly of pleading before the commercial courts; and, lastly, there is the magistracy, not usually recruited from the Bar,¹ but forming a separate class of lawyers, who, again, are subdivided into the *parquet*, or public procurators—salaried public officials entrusted with the prosecution of criminal and correctional offences, and with the protection of the public interest whenever it is involved in a private action, and amongst whose powers are included the protection of women, children, and persons of infirm mind—and the bench, forming a hierarchy of judges who, in the French system, never sit less than three in judgment, two of them practically taking the place of the jury in civil causes in England.²

Different qualifications are required for these different branches of the legal profession, but the studies necessary for their attainment are in every case provided by the same schools of law. The student selects for himself, amongst the professors and lectures delivered, the particular professors and lectures on the subjects in which he must be qualified. In the case of *avoués*, notaries, and *huissiers*, the qualification of legal study is confined to the practical part of the law in which they will be called upon to exercise their functions, though it is customary for students studying for the lower branches of the law, who can afford the expense, and who have the preliminary education enabling them to enter the university, to take the same degree in law as that which is required for those who

¹ The magistracy is recruited from graduates in law who have passed through their three years' *stage* (see *infra*). They begin by being appointed supplementary judges or assistant public procurators in Courts of First Instance, and rise from these to higher appointments. The law, however, does not prevent the appointment of advocates to all posts in both branches of the magistracy, though there are relatively few instances of this having been done.

² I should mention that under French law the jury is a part of the system for the trial of criminal, as distinguished from correctional and civil, causes. The Correctional Court sits for the trial of *delits*, the nearest equivalent of which in English is misdemeanour, without a jury.

are entering its upper branches—that is, the Bar and the magistracy. For the latter alone is a complete course of legal study required.

The law school, on the other hand, does not confine its teaching to the preparation of the student for a professional career in law. The study of the law is the university training of the well-to-do Frenchman, of the Frenchman who aspires to any of the higher grades of the administration, and of those who intend to offer themselves for the diplomatic or consular service.

Thus official instruction in the law in France is not directly connected with any profession. The law faculty of the university, in which it is given, is like the faculty of arts or science. The aim is to afford the student the means of acquiring knowledge in all departments of the law. These different departments, however, are co-ordinated to enable the student to study law systematically, and, if he wishes, to conclude his studies by taking the degree which qualifies him for the higher branches of the profession, or to certify that he possesses that knowledge of principles and theory apart from practice which the French consider as indispensable to a man who has to apply the law as a public official.

Faculties of Law: The "Licence en Droit."—There are thirteen complete faculties of law in France. Of these, I can only speak from personal experience of one, viz., Paris, where I studied; but I may add that the other faculties only differ from that of Paris in being organised on a smaller scale.

The Paris faculty is composed of twenty-nine professors, three assistant professors, and six supplementary professors in the active exercise of their functions. The teaching of these professors is distributed with a view to enable the student to take the degree of *licencié en droit* as the termination of an ordinary three years' course of university study. There is an examination at the end of each year, and no student for the degree of *licencié* can enter for any of the three examinations out of their prescribed order.

The subjects of the first year's study are as follows: *Roman Law*.—The lectures on this subject embrace the whole of the legal institutions of Rome, with a view to initiating the student into the part which history plays in the development of law. *History of French Civil and Constitutional Law*.—Here the idea is to awaken in the student that interest in tradition, and at the same time that critical understanding of laws by reference to their origin, which will bring him to respect their character without making him a slave to their form. In the same order of ideas there is a course of lectures for the first year's student in *Political Economy*, treated with regard to the current development of legislation, on the assumption that he will be enabled to understand a law better if he sees the reason of it. Lastly is included about one-third of the contents of the *Civil Code*, in which the lecturer endeavours again to explain why the law is as it is, and, as far as possible, to connect its provisions with the ethical basis upon which it rests.

The second year's study includes another one-third, approximately, of the matters treated in the *Civil Code*. The study of *Roman Law* continues, but in this year it is treated with special reference to what contemporary French law has borrowed from it. In this year, also, the student must attend the lectures on *Criminal Law*, *Administrative Law*, and *Public International Law*.

In the third year he takes the remaining one-third of the contents of the *Civil Code*, and *Commercial Law*, *Private International Law*, and *Civil Procedure*.

The examinations are oral, except short essays on some points of practical law, which are written on the spot, and are not in the nature of a thesis.

The Doctorate of Law.—Above the *licence en droit* is a higher examination, called the doctorate of law. For this examination, which follows the *licence*—that is to say, no one who is not a *licencié en droit* can present himself for the examination in the doctorate—the subjects are practically the same, except that the knowledge required is more far-reaching. In Roman law, the lectures for the doctorate include the digest, and the lecturers on the civil and criminal codes introduce comparisons with other legislations. The only real addition to the matters for the doctorate is a thesis on some subject fixed in accord with one of the professors, who undertakes to preside at a sitting at which the candidate “defends” the conclusions arrived at in his thesis. A jury of the faculty is appointed, with three weeks’ notice to the candidate to appear before them, and unless the candidate shows that he thoroughly understands what he has presumed to write upon, he is not admitted to the degree. Some of these theses are valuable documents, and have made the reputation of the candidate before he has left the university.

“Agrégation.”—Above the doctorate is the *agrégation*, or the competition for the post of supplementary professor or *agrégé*, in which the candidate not only writes a thesis, but also delivers test lectures on the branch of law he has chosen. This higher examination for the professorate can only be passed by doctors in law.

Qualification for Bar.—No Frenchman is entitled to call himself an advocate, or to practise as such before the French Civil and Correctional Courts or the Court of Assize, unless he has passed the *licence en droit*, and in addition has gone through a three years’ *stage* of actual practice. This *stage*, however, is really of little or no import, inasmuch as a *stagiaire* is entitled to plead in Court in order to obtain the practice it is intended this so-called *stage* shall afford him.¹

¹ In the decree of December 14th, 1810, the *stage* is described as the “assiduous attendance of the hearings in Court” (Art. 15). The *stagiaire* is also expected to attend the weekly “moots” presided over by the *bâtonnier* or dean of the “Order of Advocates.” Lastly, litigants *in formâ pauperis* are committed to his care.

Wide Knowledge of the Law in France.—The teaching of the law in France in the manner I have described has had the effect of making the knowledge of its elements widespread among all classes of educated French society. In fact, an Englishman in France is amazed to see how general such knowledge is. I cannot say that it is "a dangerous thing." The merchant, the manufacturer, the sea captain, most average men in private life, will draw up—and fairly well—a contract or any ordinary legal undertaking without professional assistance; and if the laity can dispense with our services, we must, of course, be the last to complain! Nevertheless, fortunately for the French legal profession, the prevalence of amateurs does not seem to deprive professional men of work, for in no country are there more practising lawyers than in France.

I have endeavoured to give you as briefly as possible some idea of legal education and its connection with the legal profession in France, and this was all I was invited to do. As practical lawyers, however, you may expect me to add whether, according to my experience of some twenty years, the results of this education suggest any points in which it might serve as a model for Englishmen or for you.

Comparison of Systems.—The ground is treacherous. In comparing a French lawyer with an English or an American lawyer, it is easy to mistake as due to his special education a state of things really due to causes much deeper or lying quite outside it. Institutions seem only to produce their full effect on a nation when they become interwoven with its character, habits, and traditions, and on these an artificial institution like programme education may be long in producing a marked influence.

The qualifying degree for the highest branch of the legal profession, as you have seen, is the *licence*, obtained in the ordinary course after a study of three years. The intentions of those who drew up the successive programmes of study for this degree were excellent. The idea of giving the student a complete survey of law in all its elements and applications of general culture in a whole great department of human intellectual activity, is admirable. I am afraid, however, few students are gifted with a sufficient power of assimilation to derive much benefit from so exhaustive a course. The subjects are far too numerous to allow of the student ever mastering them, or any of them, properly, and the discipline of thoroughness is lost. Moreover, the French mode of education generally is defective in being directed too much to the acquisition of knowledge and too little to the acquisition of the power to think, to judge, and to act. Hence an English lawyer, with his wretched practical education, his almost total ignorance of principles, his incapacity to deal with a thought in law, is on an average a sounder and more sensible lawyer than the Frenchman. Perhaps this, to some extent, is due to the circumstance that in ninety-nine out of every hundred cases which come into the hands of the lawyer, matters of fact are of greater importance than matters of law, and that the training in life

of the young Englishman fits him better than any theoretical training in law can do to deal with matters of fact. Be that as it may, this is no reason why we should not do our best to promote a better and ever better legal education than we have.

Law is the outward manifestation of the national conscience, and, as such, is not only the study for professional practitioners, but is also properly a study for politicians, civil servants, statesmen, diplomatists, and all who have to administer it.

A complete faculty, after the fashion of the system in France, for the study of law as a branch of scientific inquiry, would certainly promote good legislation. To have such a faculty, composed of professors to whose knowledge the Legislature could appeal, and who more especially would serve as critics of existing laws, would be of priceless value to the nation.

As regards the examinations and education for the Bar, other things besides a knowledge of the principles of the law are necessary, and it is only, I believe, by severe mental discipline, and an ingenious combination of wide knowledge of things in general, as well as of law and actual practice in the work of the profession, that good, sensible lawyers, as heretofore, will continue to be made.

SOUDAN CRIMINAL LAW.

[*Contributed by W. F. CRAIES, ESQ.*]

ENCLOSED in green covers, to soothe Muslim susceptibilities, given the force of law by the signature of Lord Kitchener of Khartoum, and issued from the National Printing Office at Cairo, the new Soudan Penal Code and Code of Criminal Procedure afford a significant proof of the effect of British control in the Khedive's dominions, and mark a long step towards the evolution of law and order out of the barbaric chaos of the Mahdi's tyranny.

Indian Models Followed.—Both codes are adapted from the Indian codes. This course has no doubt been deliberately chosen, not merely that the Criminal Law of the Soudan might be modelled on that of the ruling race, but because the Indian codes have been carefully framed for use among Muslims, and have stood the test of forty years' experience.

Treason Clauses.—When the Soudan was reconquered Lord Salisbury made a significant announcement, which implied a claim by Great Britain to have, at the least, a share in the territory then acquired, and this claim seems to be maintained in the frame of the clauses of the Penal Code dealing with treason, where a distinction is drawn between the Government of the Soudan and the Khedive of Egypt (see s. 93).

In the case of British conquests it has been a common practice to leave intact the Civil Law prevailing in the conquered territory, but to substitute English Criminal Law for that previously obtaining. This course was adopted in Quebec and in the captured Spanish West Indies ; but there is a notable and, in some respects, an unfortunate exception, in the case of possessions acquired from the Dutch, where the Roman-Dutch Criminal Law has been allowed to continue in force.

In the Soudan there was ample justification for introducing a new and well-ordered system of Criminal Law and Procedure,—and policy and experience alike made it preferable to frame such system in accordance with Indian rather than with Continental precedents,—though we do not doubt that the Government of the Soudan deliberately and from motives of policy elected to frame and issue their codes in the English form and language, rather than adopt schemes framed by French lawyers or by judges of the mixed tribunals in Egypt.

Some Characteristics of the Code.—The statements already made with

respect to the origin of the codes render it unnecessary to go at any length into their details, and their special characteristics may be briefly indicated.

The Penal Code is to a large extent a replica of the great Indian Code, though perhaps not embodying its very latest amendments, and with certain excisions and rearrangements and attempts at re-drafting, and with some modifications of the law, apparently intended to adapt it to the prejudices or customs of the Soudanese, and some changes in the illustrations, to make them comprehensible to the Soudanese. The introduction of a "steam hooter" as an illustration of a noise which is, or is not, a nuisance, according as it is heard in a residential or a manufacturing district, throws an unexpected light on the industrial development of the country (see s. 204).

Its Extent.—The Code does not extend, *proprio vigore*, to the whole Soudan, but will take effect in such parts of the Soudan as the Governor-General may from time to time, by notice in the *Soudan Gazette*, order (s. 1). S. 2 renders the Code the sole criminal law for those parts of the Soudan in which it is in force, subject to the exigencies of Martial Law, where that is in force; and so soon as the Code comes into force in any part of the Soudan, it binds public servants throughout the Soudan, and becomes the personal law throughout the Soudan of persons "ordinarily resident" in a district to which it applies, and the personal law for all purposes for subjects of the Khedive domiciled in such a district (s. 3). This last proposition is probably intended to apply only to the acts or omissions of domiciled Egyptians in unsettled parts of Africa; but its terms are wide enough to make them liable in the Soudan under the Code for offences under it committed in any part of the world.

In connection with this general provision it is well to note s. 93, which provides for the abetting by persons in a part of the Soudan in which the Code is in force of offences against the law of a part of the Soudan in which the Code is not in force.

Arrangement.—Some sections included under general explanations are in the Indian Code, and we think more appropriately placed under particular titles. Such is the definition of provocation, which is s. 38 of the Soudan Code, but in the Indian Code appears as part of s. 300, under the head "Homicide." S. 56 of the Soudan Code differs from ss. 76-9 of the Indian Code, on which it is framed, by making that not an offence which is done by a person who in good faith believes himself to be bound by law to do it or justified in doing it. The Indian Code limits the exemption to cases where the belief arises "by reason of a mistake of fact and not by reason of a mistake of law." The change involves a departure from English law.

Offences against Religion.—In dealing with offences against religion, the lawgiver has omitted s. 298 of the Indian Code, as to the use of language, etc., with deliberate intent to wound the religious feelings of any

person. The omission is no doubt premeditated ; and it gives the enthusiasts of Islam and Christianity freedom in proclaiming the demerits of their respective faiths.

The definitions of homicide have been re-drafted (Soudan, ss. 227, 228), but we think without substantial change.

Slave-dealing.—Slavery is not, *eo nomine*, prohibited ; but ss. 279-90 are wide enough to cover most forms of it, and ss. 289 and 290, which we have not traced in the Indian Code, seem in effect to prohibit slave-catching and slave-dealing.

S. 289 :

Whoever kidnaps or abducts any person with intent that such person may be *unlawfully* compelled to labour against his will shall be punished with imprisonment, etc.

S. 290 :

Whoever, for money or money's worth, transfers, or purposes to transfer, the control of the person of any man or woman to another person with intent to enable such other person to unlawfully confine such man or woman, or to unlawfully compel him or her to labour against his or her will, shall be punished with imprisonment, etc.

Criminal Procedure.—The extent of the application of the Soudan Code of Criminal Procedure is regulated (see s. 1) in the same manner as that of the Penal Code ; but it also applies to proceedings under laws other than the Penal Code, which contains no special regulations as to procedure (s. 2). It is a much abbreviated adaptation (containing two hundred and sixty-seven sections) of the Indian Criminal Procedure Code (Act V. of 1898), which contains five hundred and sixty-five sections, and, like that Act, has a most valuable schedule of offences under the Penal Code, showing the modes of lawful arrest, the Court of trial, and the lawful punishments.

There is no High Court for the Soudan. The highest Court of criminal jurisdiction is that of the *mudir*, corresponding to the Courts of Session in India (s. 4), and consisting of three magistrates, including the *mudir*, or a first-class magistrate, nominated by him to preside (s. 5). Four other classes of Courts are formed, as in India. The provisions as to arrest are very much the same as in India, substituting sheikhs and other local magnates for village headmen and the like. The statement of the charge and the procedure as to joinder of offences, amendment, etc., is almost exactly that of India. The charge may be framed in English or in Arabic. Trials are conducted as a general rule in Arabic, and the two higher Courts are in the main regulated by the procedure on a court-martial under Egyptian military law (ss. 156, 157), and there is no jury. All judgments of a minor district Court are submitted to the *mudir* for confirmation, and all judgments of the *mudir's* Court are submitted to the Governor-General (ss. 181, 182),

and the convict is entitled in any such case to appeal to the confirming authority.

Compensation for False Arrest.—There is a provision common to both codes (Soudan, s. 263 ; Indian, s. 553) which might well be imitated in England—*viz.* that empowering a magistrate who has summarily tried a case in which a man has been groundlessly arrested to award him a small sum to be paid by the prosecutor in compensation for the loss of time and cost consequent on the arrest.

There is little doubt that those who have to frame codes for British possessions in comparatively unsettled districts will find these codes useful aids to be used in conjunction with the Colonial Office Model Code.

SKETCH OF THE OTTOMAN LAND CODE FOR CYPRUS.¹

[Contributed by MR. JUSTICE MIDDLETON.]

Land Laws of Cyprus.—At the occupation of Cyprus by Great Britain on July 13th, 1878, the law relating to land found in force there was the Ottoman Land Code, which was promulgated by Sultan Abdul Mejid on Ramazan 7th, 1274, or April 21st, 1858. As to the law affecting land which prevailed in Cyprus before that date it is almost impossible to obtain any reliable information; but it is probable that it consisted of the Sheri, or religious law, Imperial Irades, or orders, and Fetvas, or opinions of the Sheikhs-ul-Islam and Muftis, based on, or independent of, such orders, which were construed and enforced by the local Sheri or religious Courts in conformity with the religious law. The Land Code itself, as I am informed, is a compilation and codification of the various Irades and Fetvas issued previously by the Imperial and high religious authorities above referred to. Following on the Land Code came a number of laws, regulations, and instructions, which together with the Land Code have been translated into English by Mr. Frederick Ongley, Assistant to the Registrar-General in the principal Land Registry Office, and compiled in one volume.²

Since the occupation the Land Code and these regulations, etc., have been to a small extent amended by local legislation, but the former still remains the guiding authority under which all matters relating to land are adjusted and administered in the Courts and by the Government of the island. An attempt has been made to give an outline of the principal provisions of the code as they affect the different kinds of land known in the Ottoman Empire, and more particularly as they are applied in Cyprus. It has often been, and no doubt will be in future, a matter of extreme difficulty to give a reasonable construction to some of the more obscure

¹ Mr. Gaspard Amirayan, Barrister-at-law of the Inner Temple, Registrar of the Supreme Court of Cyprus, and an accomplished Turkish scholar, having been kind enough to read through this short sketch for me, it may, I think, be safely assumed that the Turkish words expressed in Roman characters are correctly written and translated.

² Clowes & Sons.

articles of this code, and the Supreme Court¹ has found no inconsiderable difficulty in doing so.

It has to be borne in mind, also, that Cyprus is still a portion of the Ottoman Empire; and Ottoman Law,² as found in existence upon the occupation, is still in force in the island. But by the Cyprus Courts of Justice Order, 1882, no amendment of the Land Code, or in fact of any Ottoman law made by Ottoman authority, would be applicable to Cyprus if made after July 13th, 1878.

Different Kinds of Land in Ottoman Empire.—Land in the Ottoman Empire is divided according to the Ottoman Land Code into five great categories :

1. *Erazi-i-Mirié* (literally, "Treasury or Exchequer land"), which comprises the bulk of the land in Cyprus and from which certain of the *Vaqf* (literally, "detention"; technically, "dedication") lands and some of the *Erazi-i-Memlouké* (or "land of *plenum dominium*") have been severed by patent from, or permission of, the sultans. This kind of land was formerly held by the permission of the possessors of the feudal fiefs called *Timars*³ and *Ziamets*,⁴ who were considered the *domini soli*, and for a certain time by the grants of *Multezims* (tax-farmers for a term) and *Muhassils* (grantees for the right of collecting taxes both in a *Kaza*, or district, and in a *Sanjak*, now a province of the second class). These being subsequently abolished, *Erazi-i-Mirié* is now held by the permission of the official appointed by the Government for the purpose, as representing the State, who is usually the head of the local Land Registry Office. It is of this kind of land that the Land Code mainly treats.

2. *Erazi-i-Memlouké* (literally, "land of *plenum dominium*"), commonly called "*Mulk*," which comprises—

- (a) Building sites within a town or village, and places on the border of a town or village not exceeding half a *donum*, or about one-eighth of an English acre in extent.
- (b) Land separated from *Erazi-i-Mirié*, and granted by patent of the Sultan to be held with *plenum dominium* in accordance with the terms of the *Sheri*, or religious law.
- (c) *Erazi-i-Ushrié* (literally, "tithe-paying land"), land given to and

¹ The decisions of the Supreme Court from 1883 to 1898 are reported in four volumes published by the Government under the authority of the judges.

² Where not repealed or amended by Cyprus Statute Law.

³ *Timar* : a feudal fief of a nominal yearly value not exceeding 19,999 *aqches*.

⁴ *Ziamet* : a feudal fief of a nominal yearly value ranging between 20,000 and 100,000 *aqches*. The possessors of these fiefs held them usually on grants for life, and were not removed unless they committed serious offences. Besides their military and administrative duties, they enjoyed the privileges of collecting the tithe due on the land, of carrying out all transactions relating to the transfer of land on its alienation or transmission by inheritance, of collecting of fees, of granting out the lands that have been vacated, and of issuing title-deeds. The holder of a *Ziamet* had to supply a horse-soldier for every 5,000 *aqches*, and the holder of a *Timar* a foot-soldier for every 3,000 *aqches*.

distributed amongst the Moslem conquerors at the time of a conquest.

- (d) *Erazi-i-Kharajé* (literally, "land left in the hands of the original non-Moslem owners at the time of a conquest").

If an owner of these two latter classes dies without heirs, the land vests in what is known as the *Beit-ul-Mal* (literally, "house of property," or Public Treasury of Islam), and falls into the category of *Erazi-i-Mirié*.

What is called the *Raqabé* (literally, "nape of the neck," or "slave"; technically, "the substance of the soil and its full proprietorship") of all *Erazi-i-Memlouké* belongs to the owner of it, who in fact has *plenum dominium* over it. It is inherited like movable property, and is subject to the provisions of *Vaqf*, mortgage, gift, and pre-emption. The provisions of the Land Code do not apply to *Erazi-i-Memlouké* as such.

3. *Erazi-i-Metrouké* (literally, "abandoned land") comprises—

- (a) Land left and dedicated to the public, such as public roads;
- (b) Land left and assigned to the inhabitants of villages or towns as a body, such as pasture-lands.

4. *Erazi-i-Mevat* (literally, "dead or waste land"), which is in nobody's possession, and not having been left or assigned to the inhabitants, is so far from a town or village that the loud voice of a person from the nearest inhabited spot cannot be heard there. The code further specifies the distance between the two points as about one mile and a half,¹ which is supposed to be traversed in about one hour and a half.

5. In addition to these four original categories of land there are the *Erazi-i-Mevqoufé* (literally, "stopped"; technically, "dedicated, or *Vaqf* lands"), comprising a considerable portion of the soil of the Empire; but as these lands are mainly derivative from or carved out of the *Erazi-i-Mirié* and *Erazi-i-Memlouké*, they are really of a secondary and compound character, and cannot, it is submitted, properly speaking, be classed with the four great primary divisions already mentioned.

Varieties of the *Erazi-i-Mevqoufé* Land.—The *Erazi-i-Mevqoufé* are divided into two classes:

- (a) *Vaqfs* created out of *Erazi-i-Memlouké* by their owners, who have dedicated them wholly or partly to religious objects in accordance with the terms of the *Sheri*, or religious law. These are known as pure *Vaqfs*, and they are not governed by, nor subject to, the provisions of the Land Code, and all litigation respecting them must take place in the *Sheri* Courts.
- (b) *Vaqfs* separated from *Erazi-i-Mirié* by or with the permission of the sultans, who by so doing allow the tithes and taxes thereon due to the State to be dedicated wholly or partly to some religious object. This category of *Erazi-i-Mevqoufé* is called *Takhsisat*

¹ One Turkish mile is practically the time that an animal such as a donkey takes to walk three English miles, or one hour English.

(literally, "assignments, endowments"), and forms the bulk of the Vaqf property in the Ottoman Empire.

The provisions of the Land Code apply to this class of Vaqfs; and whenever the words *Erazi-i-Mevqoufé* are mentioned therein, it is this class which is meant; but the *Evqaf* (Arabic plural of *Vaqf*) Department stands to them in the same position which the State, represented by the *Beit-ul-Mal*, or Treasury, occupies as regards *Erazi-i-Mirié*, and receives all the dues and fees legally payable on the land.

There is also another kind of this class of *Erazi-i-Mevqoufé* in which the dedication is limited either to the right of possession alone or to that right plus the tithes and taxes. The Land Code does not apply to the sale and inheritance of this sort of *Erazi-i-Mevqoufé*, and it is not necessary to notice it further.

The dedication of *Erazi-i-Mevqoufé* must be such as to make it either a *Mazbouta* (literally, "controlled") or non-*Mazbouta* or *Mulhaqa* (literally, "annexed") *Vaqf*.

Mazbouta *Vaqfs* are those in which the appointment of trustees and direct management is vested in the *Evqaf* Department, or if the appointment of trustees is vested in the beneficiary the management only is carried out by the *Evqaf* Department. *Mulhaqa* or non-*Mazbouta* *Vaqfs* are those which are administered by the *Mutevellis*, or trustees, under the supervision of the *Evqaf* Department, and "annexed" to that department probably for the prevention of fraud in their administration. It is not necessary or possible in a short sketch of this kind to consider further the attributes of, regulations, and laws relating to the administration of *Vaqfs*,¹ which are somewhat voluminous; but it was hardly possible to describe that kind of *Erazi-i-Mevqoufé* to which the Land Code is applicable without mentioning shortly the other kinds and their main divisions.

Erazi-i-Mirié Land.—The theory of the compilers of the Land Code as regards *Erazi-i-Mirié* appears to be that the *dominium* of such land always remains in the State, and that its *Raqabé* belongs to the *Beit-ul-Mal* as representing the State. Figuratively speaking, the *Raqabé*, or "the nape of the neck," is under the yoke of the State, and all transactions or dealings with it are subject to the approval of what is called the "competent authority"—usually the head of the Land Registry Office; while upon its sale or transfer by inheritance the State is entitled to exact fees and dues, or upon its becoming *Mahloul*, or vacant, for lack of heirs or other reason, it reverts to the State. The nature of the tenure of *Erazi-i-Mirié* perhaps more nearly approaches that of land held under the contract of *emphyteusis* known to the Romans; but the converse of the rule of English and Roman

¹ A treatise on the laws of *Evqaf* by Omer Hilmi Effendi has been translated by C. R. Tyser, Esq., President of the District Court of Kyrenia, and Mr. G. D. Demetriades, Registrar of that Court, and was published by the Government of Cyprus last year.

Law, "Solo cedit quod solo inaedificatur," prevails under the Turkish Land Code, as I think will appear later on.

The possession of *Erazi-i-Mirié*, appertaining to a town or village, cannot be granted *en bloc* to the inhabitants generally, nor can it be given so to any one or more of the inhabitants by selection. It must be granted so that all the inhabitants may, if they so desire it, share in it.

The main object of its grant¹ by the State is, that it may be cultivated, and produce revenue to the State in the shape of tithes and land tax; and a cultivator and tax-payer, even though a trespasser as regards the rightful possessor, is not liable for mesne profits or deterioration. According to the code, if the land is allowed to remain uncultivated for three years by its possessor without valid excuse, such as recuperation, inundation by water, or the capture in war of its possessor, it can be resumed by the State, which can give it back to its former holder on his paying the *Bedel-misl*,² should he desire it, or, if not, transfer it after auction to the highest bidder. The harshness of this provision has been modified in Cyprus by extending the period of non-cultivation to ten years. The *Erazi-i-Mirié* of soldiers on active service, minors, and idiots is not liable to forfeiture for non-cultivation. The possessor of *Erazi-i-Mirié* may not make bricks or tiles of the soil, nor make it into a garden, vineyard, or wood, nor plant trees, nor build on the land, nor may he or any one else bury a corpse on the land without the permission of the competent State official.³ It has also been gravely doubted by the Supreme Court of Cyprus if a well can be dug on land of this category without such authority. The foregoing prohibitions can be enforced by the State by the exaction of compensation and by the uprooting, demolition, and removal of the forbidden things; but this, it is believed, is rarely done, and certainly only on the ground of a serious interference with some public or private interest in Cyprus.

An important exception is made in the case of gardens of fruit-bearing trees and vineyards planted on *Erazi-i-Mirié* without the necessary permission. If these have existed for three years without the interference of the State, they obtain a legal status as if they had been planted by permission, and are not subject to the land, but become the Mulk, or full property, of their originator, and by the code the tithe is assessed and levied on their produce.⁴ No such privilege appears to appertain to the planting of woods or building houses without permission; but it is probable that unless the doing so involved some grave breach of either public or private interests, they would be allowed to remain, and the tax in lieu

¹ The provisions of the code seem to imply this.

² *Bedel-misl*: literally, "equivalent value"; but according to one of the regulations it means the estimated value fixed by impartial experts.

³ These restrictions are not enforced in Cyprus as a general rule.

⁴ By the Taxation Amendment Law, 1884, the tithe on grapes in Cyprus was abolished from and after March 13th, 1884.

of tithe on the land occupied by them would be duly assessed and levied. The peculiarity of all planting and erection on *Erazi-i-Mirié* with the permission or assent of the competent authority is, that the land becomes subject, as it is called, to the things put upon it, and that they, together with the land *actually* occupied by them, for the time being, become Mulk, or full property, and are governed by the laws relating to the inheritance, etc., of such property. When the land is again free of them by the drying up, or uprooting of the trees, or the ruin of the buildings beyond a sign of construction, it reassumes its character of *Erazi-i-Mirié*, and their late owner, if he desires it, has a preferential right to a re-grant of the land upon paying the *Bedel-misl* to the *Beit-ul-Mal*. If, however, the land has been in his possession as *Erazi-i-Mirié* before it was occupied by trees, vines, or buildings, then he can retain it without any payment to or objection from the *Beit-ul-Mal*. The code also contemplates the possession of the land by one person, while the owner of the trees or buildings is another; and here again the subjection of the land to the Mulk on it is emphasised by the fact that the owner of the Mulk has a preferential right to become the possessor of the *Erazi-i-Mirié* upon which the Mulk stands, should the possessor of the *Erazi-i-Mirié* desire to alienate it. Trees growing naturally on *Erazi-i-Mirié*, such as the *valonia*, walnut, *yoke-elm*, and oak, are, on the contrary, subject to the land, and their profit belongs to the possessor of the land, who has, however, to pay a tithe on the produce of fructiferous trees.¹

Originally the possessor of *Erazi-i-Mirié* bearing trees growing naturally could not cut them down or deal with their timber without paying the value of them to the Treasury. By a later law, however, this restriction has been abrogated, and the lawful possessor of the soil is now at liberty, in Cyprus, to deal with trees of this kind as he chooses. *Erazi-i-Mirié* cannot be held either by corporate bodies or trustees. The reason for this prohibition is no doubt to prevent the loss of revenue in fees payable on inheritance.

Acquisition of *Erazi-i-Mirié*.—Throughout the Ottoman Empire a system of land registration is in force which, if it were honestly and accurately carried out, would no doubt be a serviceable one. The headquarters of the department is called the *Defter Khane-i-Khaqani*, and is situate in *Stamboul*. Each *Vilayet*, *Sanjak*, or *Liva*, and *Kaza*, which are the three administrative divisions into which the Empire is divided and sub-divided, has its Land Registry Office, the *Kaza* subordinate to the *Sanjak* or *Liva*, and the latter, if not directly responsible to the central authority at *Stamboul*, subordinate to the *Vilayet*, in its turn responsible to headquarters.

In Cyprus there are five local offices and one principal Land Registry Office, presided over by an English official called the Registrar-General; and

¹ By the Reform of Taxation Law, 1897, figs, lemons, citrons, oranges, pomegranates, and various other products were freed from the payment of tithe.

title-deeds are issued by these offices mainly in conformity with the regulations laid down by the Ottoman Government, and found in force in Cyprus upon its occupation by England. There is of course now no reference to Stamboul, and much greater accuracy and care is displayed in the registering of new titles and cancelling of old ones than prevailed under the Ottoman administration. There is still, however, large scope for improvement; but it is feared that no system, however good it might be, could be accurately worked until a proper cadastral survey has been made of the island. According to the law in force, no person is permitted to hold *Erazi-i-Mirié* without a title-deed. The possessor of *Erazi-i-Mirié* can only validly alienate to another with the permission of the competent State official, who is usually the chief of the local Land Registry Office in Cyprus, the transaction being duly registered and a new title-deed given to the alienee.

Upon alienation of *Erazi-i-Mirié* the trees growing naturally on it pass with the land, without the necessity of any mention being made of them upon the transfer before the proper official. But Mulk trees thereon do not pass, unless at the time of the sale the alienor states that he sells them also. Sales and mortgages in Cyprus must be carried out by a written declaration of sale or mortgage made by the vendor and purchaser, or mortgagor and mortgagee, and declared by them to be true in the presence of a land registry officer charged with that office, who passes it on with the necessary evidence of the vendor's ownership, identity, and due payment of taxes up to date into the Land Registry Office, where registration takes place, and whence new title-deeds are issued if the transaction is found to be in order.

Erazi-i-Mirié can also be acquired by uninterrupted possession for a period of ten years; and if this is proved to the satisfaction of the local Land Registry Office a title-deed will be granted for it. If, however, the former possessor was under certain disabilities, such as madness, or minority, or absence in a distant country, he can, according to the code, vindicate by action his legal rights to the possession of the land for a period of ten years following the cessation of the disability under which he was labouring. This period of ten years has by Cyprus Statute Law¹ been reduced to five, and by the same legislative authority the possession of *Erazi-i-Mirié*, coupled with registration for ten years, gives an indefeasible title; while no action is maintainable against an unregistered adverse possessor of *Erazi-i-Mirié* for ten years, unless the person instituting such action has been lawfully entitled to be and has been actually registered for such land during some part of the time of such adverse possession. It is believed, however, that this last enactment would in practice be in some cases unworkable.

The fee payable to the Government Treasury on a sale of *Erazi-i-Mirié* is 5 per cent. on the sale price in addition to the registration fee.

¹ The Immovable Property Limitation Law, 1886, as amended by Law V. of 1887.

Transmission of Erazi-i-Mirié by Inheritance.—Erazi-i-Mirié descends to the heirs of its possessor in the following order :

(1) To the children ; the children of a deceased child taking their parent's share.

(2) To the grandchildren.

(3) To the parents or parent.

(4) To the brothers by same father, whether by the same or a different mother.

(5) To the sisters by the same father, whether by the same or a different mother.

(6) To the brothers by the same mother.

(7) To the sisters by the same mother.

(8) To the surviving spouse, provided that the surviving spouse takes a share of one-quarter with the heirs under Nos. 3, 4, 5, 6, and 7.

Erazi-i-Mirié cannot be transmitted by will.

The Erazi-i-Mirié of a Mussulman cannot be inherited by a non-Mussulman heir, and *vice versa* ; nor can the murderer inherit that of the person he has murdered. By the Land Code the Erazi-i-Mirié of an Ottoman subject cannot be inherited by an heir who is a foreign subject, nor can the Erazi-i-Mirié of a person who has abandoned his Ottoman nationality pass to his heirs, whether they are Ottoman or foreign subjects, but escheats to the State as *Mahloul*, or vacant land. It would seem, however, now, that under certain laws which have been passed in the Ottoman Empire on the subject of Ottoman nationality, some of which are applicable to Cyprus, this latter restriction may have been modified.

The fee payable to the Government Treasury on transmission by inheritance of Erazi-i-Mirié is $2\frac{1}{2}$ per cent. on the registered value, in addition to the registration fee.

Mahloulat, or Vacancies.—If Erazi-i-Mirié becomes unoccupied or vacant by the failure of heirs, as above indicated, and there being no persons having a *Tapou* right on it, as it is called, it then escheats to the State, and can be re-granted by sale to the highest bidder.

The right to *Tapou* means a preferential right to become possessed of the land on payment to the State of its *Tapou* or equivalent value. This right can be claimed for a period of ten years in case of persons owning *Mulk* buildings or trees on the land, or inheriting such property as next-of-kin—for five years by partners of a deceased possessor, and for one year by inhabitants of the village in which the land is situated, dating from the death of its deceased possessor.

Mortgage and Forced Sale of Erazi-i-Mirié for Debt.—Erazi-i-Mirié cannot be pledged, but can be alienated (*Firagh-bil-Shart*¹—literally, “transfer

¹ It is difficult from the language of the text to understand the difference between these two forms of mortgage, and the commentators universally agree that they are identical ; but *Firagh-bil-Vefa* is the form in constant use in the Ottoman Empire.

on condition") against a debt, by permission of the official, on condition that when the debt is paid the land is returned; or it can be mortgaged by way of *Firagh-bil-Vefa* (literally, "transfer on trust"), some person being appointed—generally the creditor—as a *Vekil*, or agent, to sell, unless the debt is paid within the time limited by the mortgage. In the latter case the debtor can always claim restitution of the land on payment of the debt till it is sold by the *Vekil*.

By the Law of Ramazan 23rd, 1286, or December 27th, 1869, the mortgaged land can now be sold even after the death of the debtor without heirs; but, by the Ottoman Land Code, in such a case it became *Mahloul*, or vacant, and followed the procedure applicable to that sort of land. By the same law, if the debtor died before paying the mortgage-debt, it became exigible in the first instance from his movable property, and the mortgagee was limited to the land mortgaged for the recovery of his debt.

The procedure for mortgaging *Erazi-i-Mirié* is now regulated in Cyprus by Law XIX. of 1890, and is in most respects the same as that to be followed on sale; and as by the Law concerning the Sale of Immovable Property for Debt, dated *Shevval*, 1288, or December, 1871, *Erazi-i-Mirié* can be sold, like movables, for a judgment-debt without the consent of the debtor, it is possible now for the mortgagee, if he claims and proves his debt in an action, to obtain a judgment which will enable him not only to sell the land mortgaged, but also any other unencumbered land which the debtor may have for the payment of the debt which was secured by the mortgage. Under the law in force in Turkey, however, a house appropriate to the debtor's position in life is exempt from sale; while if he is a farmer, a sufficient quantity of his land for the maintenance of such a house, to be determined by the Court hearing the action, must be left to him.

This latter beneficent exemption of an autocratic Government has been abolished by the Legislature of Cyprus,¹ and the whole of any debtor's immovable property there is now liable to be sold in execution of a judgment, with the exception only "of sufficient house accommodation for the debtor and his family."

***Erazi-i-Mevat*.**—This class of land can be opened up and turned into arable land in exchange for the right to possess, with the permission of the competent authority; and its *Raqabé* belongs to the *Beit-ul-Mal*, and it is governed by all the provisions of the Land Code applicable to *Erazi-i-Mirié*. If the new occupier does not cultivate it for three years, and has no valid excuse for leaving it in its original state, the land can be given to another person. If any one opens up *Mevat* land without permission, it can be granted to him on his paying the *Bedel-misl*, and a title-deed is given to him.

¹ Law X. of 1885, s. 48.

Erazi-i-Metrouké.—This category of land, to which communal forests, or Baltalyks, public roads, places of worship, public places for putting carts and animals, market and fair places, village pasture-lands, village summer and winter grazing-places (Yailaks and Kishlaks) belong, is mentioned specifically in the Land Code ; but as these places cannot be individually possessed, bought, sold, inherited, or used for any other purpose than that for which they were destined and assigned *ab antiquo*, the general provisions of the code do not apply to them.

THE AUSTRALASIAN FEDERATION BILL.

IN view of the fact that the Bill to constitute the Commonwealth of Australia is about to be submitted to Parliament, it has been thought fit to print the measure. The Bill to constitute the Commonwealth of Australia, which was framed by the Convention which sat in Adelaide in 1897, and in Sydney and in Melbourne in 1898, and was amended by the Conference of Premiers at Melbourne in 1899, was finally adopted on a Referendum to the electors in the colonies of New South Wales, Victoria, Queensland, South Australia, and Tasmania in 1899. It has been transmitted to England on Addresses to Her Majesty from both Houses of Parliament in each of the five colonies, praying that it may be passed into law by the Imperial Parliament. The text given is that which appears in the second schedule to the Australasian Federation Enabling Act, passed by the Legislature of Victoria in July, 1899. Alterations from the original text are shown by black letters when new matter is introduced, and by underlining any old matter which is omitted from the measure adopted.

DRAFT OF A BILL

To Constitute the Commonwealth of Australia.

[]

WHEREAS the people of [*here name the Colonies which have adopted the Constitution*], humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows:—

- I. This Act may be cited as *The Commonwealth of Australia Constitution Act*.
- II. This Act shall bind the Crown, and its provisions referring to the Queen shall extend to Her Majesty's Heirs and Successors in the Sovereignty of the United Kingdom.
- III. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being

later than one year after the passing of this Act, the people of [*here name the Colonies which have adopted the Constitution*] shall be united in a Federal Commonwealth under the name of "The Commonwealth of Australia." But the Queen may, at any time after the Proclamation, appoint a Governor-General for the Commonwealth.

IV. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several Colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

V. This Act, and all laws made by The Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

VI. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"Colony" shall mean any colony or province.

"The States" shall mean such of the Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the Northern Territory of South Australia, as for the time being are parts of the Commonwealth, and such Colonies or Territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called a "State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

VII. *The Federal Council of Australasia Act 1885* is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by The Parliament of the Commonwealth, or as to any Colony not being a State by the Parliament thereof.

VIII. After the passing of this Act the *Colonial Boundaries Act 1895* shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

IX. The Constitution of the Commonwealth shall be as follows :—

THE CONSTITUTION.

This Constitution is divided as follows :—

- | | |
|---------|-------------------------------------|
| CHAPTER | I.—THE PARLIAMENT : |
| PART | I.—General : |
| PART | II.—The Senate : |
| PART | III.—The House of Representatives : |
| PART | IV.—Both Houses of The Parliament : |
| PART | V.—Powers of The Parliament. |
| CHAPTER | II.—THE EXECUTIVE GOVERNMENT : |
| CHAPTER | III.—THE JUDICATURE : |

CHAPTER IV.—FINANCE AND TRADE:

CHAPTER V.—THE STATES:

CHAPTER VI.—NEW STATES:

CHAPTER VII.—MISCELLANEOUS:

CHAPTER VIII.—ALTERATION OF THE CONSTITUTION.
THE SCHEDULE.

CHAPTER I.

THE PARLIAMENT.

PART I.—GENERAL.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until The Parliament otherwise provides, shall be ten thousand pounds.

The salary of a Governor-General shall not be altered during his continuance in office.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

5. The Governor-General may appoint such times for holding the sessions of The Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue The Parliament, and may in like manner dissolve the House of Representatives.

After any general election The Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

6. There shall be a session of The Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of The Parliament in one session and its first sitting in the next session.

PART II.—THE SENATE.

7. The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until The Parliament otherwise provides, as one electorate.

But until The Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until The Parliament otherwise, provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by The Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

13. As soon as may be after the Senate first meets and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable: and the places of the senators of the first class shall become vacant at the expiration of the third year, and the places of those of the second class at the expiration of the sixth year, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made in the year at the expiration of which the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of January following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of January preceding the day of his election.

14. Whenever the number of senators for a State is increased or diminished, The Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereon, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

20. The place of a senator shall become vacant if for two consecutive months of any session of The Parliament he, without the permission of the Senate, fails to attend the Senate.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President, or if the President is absent from the Commonwealth, the Governor-General shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

22. Until The Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

PART III.—THE HOUSE OF REPRESENTATIVES.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until The Parliament otherwise provides, be determined, whenever necessary, in the following manner :—

I. A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators.

II. The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

26. Notwithstanding anything in section twenty-four the number of members to be chosen in each State at the first election shall be as follows: [*To be determined according to the latest statistical returns at the date of the passing of the Act, and in relation to the quota referred to in previous sections.*]

27. Subject to this Constitution, The Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

29. Until The Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

30. Until The Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of the Parliament of the State; but in the choosing of members each elector shall vote only once.

31. Until The Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives, or from the proclamation of a dissolution thereof.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker, or if he is absent from the Commonwealth, the Governor-General in Council may issue the writ.

34. Until The Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

- I He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:
- II. He must be a subject of the Queen, either natural-born or for at least five years naturalised under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

37. A member may by writing addressed to the Speaker, or to the Governor-General, if there is no Speaker, or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

38. The place of a member shall become vacant if for two consecutive months of any session of The Parliament he, without the permission of the House, fails to attend the House.

39. Until The Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

PART IV.—BOTH HOUSES OF THE PARLIAMENT.

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State, shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of The Parliament of the Commonwealth.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the Schedule.

43. A member of either House of The Parliament shall be incapable of being chosen or of sitting as a member of the other House.

44. Any person who—

- I. Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
- II. Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or
- III. Is an undischarged bankrupt or insolvent: or
- IV. Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
- V. Has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth, otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or as a member of the House of Representatives.

But sub-section IV. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

45. If a senator or member of the House of Representatives—

- I. Becomes subject to any of the disabilities mentioned in the last preceding section: or
- II. Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or
- III. Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in The Parliament to any person or State:

his place shall thereupon become vacant.

46. Until The Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of One hundred pounds to any person who sues for it in any court of competent jurisdiction.

47. Until The Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of The Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

48. Until The Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of Four hundred pounds a year, to be reckoned from the day on which he takes his seat.

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by The Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

50. Each House of The Parliament may make rules and orders with respect to—

- i. The mode in which its powers, privileges, and immunities may be exercised and upheld :
- ii. The order and conduct of its business and proceedings either separately or jointly with the other House.

PART V.—POWERS OF THE PARLIAMENT.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to—

- i. Trade and commerce with other countries, and among the States :
- ii. Taxation ; but so as not to discriminate between States or parts of States :
- iii. Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth :
- iv. Borrowing money on the public credit of the Commonwealth :
- v. Postal, telegraphic, telephonic, and other like services :
- vi. The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth :
- vii. Light-houses, light-ships, beacons, and buoys :
- viii. Astronomical and meteorological observations :
- ix. Quarantine :
- x. Fisheries in Australian waters beyond territorial limits :
- xi. Census and statistics :
- xii. Currency, coinage, and legal tender :
- xiii. Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money :
- xiv. Insurance, other than State Insurance ; also State Insurance extending beyond the limits of the State concerned :
- xv. Weights and measures :
- xvi. Bills of exchange and promissory notes :
- xvii. Bankruptcy and insolvency :
- xviii. Copyrights, patents of inventions and designs, and trade marks :
- xix. Naturalisation and aliens :
- xx. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth :
- xxi. Marriage :
- xxii. Divorce and matrimonial causes ; and in relation thereto, parental rights, and the custody and guardianship of infants :
- xxiii. Invalid and old-age pensions :

- xxiv. The service and execution throughout the Commonwealth or the civil and criminal process and the judgments of the courts of the States :
 - xxv. The recognition throughout the Commonwealth or the laws, the public acts and records, and the judicial proceedings of the States :
 - xxvi. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws :
 - xxvii. Immigration and emigration :
 - xxviii. The influx of criminals :
 - xxix. External affairs :
 - xxx. The relations of the Commonwealth with the islands of the Pacific :
 - xxxi. The acquisition of property on just terms from any State or person for any purpose in respect of which The Parliament has power to make laws :
 - xxxii. The control of railways with respect to transport for the naval and military purposes of the Commonwealth :
 - xxxiii. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State :
 - xxxiv. Railway construction and extension in any State with the consent of that State :
 - xxxv. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State :
 - xxxvi. Matters in respect of which this Constitution makes provision until The Parliament otherwise provides :
 - xxxvii. Matters referred to The Parliament of The Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law :
 - xxxviii. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia :
 - xxxix. Matters incidental to the execution of any power vested by this Constitution in The Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.
52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—
- I. The seat of Government of the Commonwealth, and all places acquired by the Commonwealth for public purposes :
 - II. Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth :
 - III. Other matters declared by this Constitution to be within the exclusive power of The Parliament.
53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to

appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licenses, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may if it thinks fit make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by

an absolute majority of the total number of the members of the Senate and House of Representatives three-fifths of the members present and voting thereon, shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives three-fifths of the members present and voting thereon, it shall be taken to have been duly passed by both Houses of The Parliament, and shall be presented to the Governor-General for the Queen's assent.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General, by speech or message to each of the Houses of The Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of The Parliament, or by Proclamation, that it has received the Queen's assent.

CHAPTER II.

THE EXECUTIVE GOVERNMENT.

61. The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

64. The Governor-General may appoint officers to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

65. Until The Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as The Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until The Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

67. Until The Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth, the following departments of the public service in each State shall become transferred to the Commonwealth :

Posts, telegraphs, and telephones :

Naval and military defence :

Light-houses, light-ships, beacons, and buoys :

Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a colony, or in the Governor of a colony with the advice of his Executive Council, or in any authority of a colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

CHAPTER III.

THE JUDICATURE.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as The Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as The Parliament prescribes.

72. The Justices of the High Court and of the other courts created by The Parliament :

i. Shall be appointed by the Governor-General in Council :

ii. Shall not be removed except by the Governor-General in Council, on an

address from both Houses of The Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity.

- III. Shall receive such remuneration as The Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as The Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

- I. Of any Justice or Justices exercising the original jurisdiction of the High Court :
 - II. Of any other federal court, or court exercising federal jurisdiction : or of the Supreme Court of any State, or of any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council :
 - III. Of the Inter-State Commission, but as to questions of law only :
- and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by The Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74. No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise, by virtue of Her Royal Prerogative, to grant special leave of appeal from the High Court to Her Majesty in Council. But The Parliament may make laws limiting the matters in which such leave may be asked.

75. In all matters—

- I. Arising under any treaty :
 - II. Affecting consuls, or other representatives or other countries :
 - III. In which the Commonwealth, or a person suing or being sued on behalf or the Commonwealth, is a party :
 - IV. Between States, or between residents of different States, or between a State and a resident of another State :
 - V. In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth—
- the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

- I. Arising under this Constitution, or involving its interpretation :
- II. Arising under any laws made by The Parliament :
- III. Of admiralty and maritime jurisdiction :
- IV. Relating to the same subject-matter claimed under the laws of different States.

77. With respect to any of the matters mentioned in the last two sections, The Parliament may make laws—

- I. Defining the jurisdiction of any federal court other than the High Court :
- II. Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States :
- III. Investing any court of a State with federal jurisdiction.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

79. The federal jurisdiction of any court may be exercised by such number of judges as The Parliament prescribes.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as The Parliament prescribes.

CHAPTER IV

FINANCE AND TRADE.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon ; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of The Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for The Parliament.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from

office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

85. When any department of the public service of a State is transferred to the Commonwealth—

- I. All property of the State, of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary.
- II. The Commonwealth may acquire any property of the State, of any kind, used, but not exclusively used, in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth.
- III. The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by The Parliament.
- IV. The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until The Parliament otherwise provides of the net revenue of the Commonwealth from duties of customs and of excise, not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

89. Until the imposition of uniform duties of customs—

- i. The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth :
- ii. The Commonwealth shall debit to each State—
 - (a) the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth :
 - (b) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth :
- iii. The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

90. On the imposition of uniform duties of customs the power of The Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect ; but any grant or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, One thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of The Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until The Parliament otherwise provides—

- i. The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State :
- ii. Subject to the last sub-section, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

94. After five years from the imposition of uniform duties of customs, The Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until The Parliament otherwise provides, The Parliament may grant financial assistance to any State on such terms and conditions as The Parliament thinks fit.

97. (96.) Until The Parliament otherwise provides, the laws in force in any colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the colony, or the Government or an officer of the colony, is mentioned.

98. (97.) The power of The Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

99. (98.) The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

100. (99.) The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

101. (100.) There shall be an Inter-State Commission, with such powers of adjudication and administration as The Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

102. (101.) The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State: due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the

meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless adjudged by the Inter-State Commission.

103. (102.) The members of the Inter-State Commission—

- I. Shall be appointed by the Governor-General in Council :
- II. Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of The Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity ;
- III. Shall receive such remuneration as The Parliament may fix ; but such remuneration shall not be diminished during their continuance in office.

104. (103.) Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

105. (104.) The Parliament may take over from the States their public debts as existing at the establishment of the Commonwealth, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof ; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

CHAPTER V.

THE STATES.

106. (105.) The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. (106.) Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in The Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the States, as the case may be.

108. (107.) Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of The Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State ; and, until provision is made in that behalf by The Parliament of the Commonwealth the Parliament [of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the colony had until the colony became a State.

109. (108.) When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

110. (109.) The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the Government of the State.

111. (110.) The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

112. (111.) After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by The Parliament of the Commonwealth.

113. (112.) All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage shall be subject to the laws of the State as if such liquids had been produced in the State.

114. (113.) A State shall not, without the consent of The Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth; nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

115. (114.) A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

116. (115.) The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

117. (116.) A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

118. (117.) Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public acts and records, and the judicial proceedings, of every State.

119. (118.) The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

120. (119.) Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and The Parliament of the Commonwealth may make laws to give effect to this provision.

CHAPTER VI.

NEW STATES.

121. (120.) The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of The Parliament, as it thinks fit.

122. (121.) The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of The Parliament to the extent and on the terms which it thinks fit.

123. (122.) The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

124. (123.) A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

CHAPTER VII.

MISCELLANEOUS.

124. The seat of Government of the Commonwealth shall be determined by The Parliament, and shall be within territory vested in the Commonwealth.

Until such determination The Parliament shall be summoned to meet at such place within the Commonwealth as a majority of the Governors of the States, or, in the event of an equal division of opinion among the Governors, as the Governor-General shall direct.

125. The seat of Government of the Commonwealth shall be determined by The Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and if New South Wales be an Original State shall be in that State and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

If Victoria be an Original State The Parliament shall sit at Melbourne until it meets at the seat of Government.

126. (125.) The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or functions.

127. (126.) In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

CHAPTER VIII.

ALTERATION OF THE CONSTITUTION.

128. (127.) This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of The Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if, after an interval of three months, the first-mentioned House, in the same or the next session, again passes the proposed law by an absolute majority, with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such a manner as The Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

An **No** alteration diminishing the proportionate representation of any State in either House of The Parliament, or the minimum number of representatives of a State in the House of Representatives, or **increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto,** shall not become law unless the majority of the electors voting in that State approve the proposed law.

NOTES.

Debentures Charging French Assets.—M. Olivier E. Bodington, of Paris, writes: "English companies possessing assets in France often issue debentures charged upon 'the whole undertaking of the company' without previously enquiring whether French law permits of such security being perfected, so as to constitute such a charge upon the French assets as is expressed in the debenture deed. In point of fact, French law does not afford the same facilities as exist under English law for charging the assets of a company, and hence it not infrequently happens that an English company is unable to give to the trustees for its debenture-holders the security upon its French assets which has been promised by the terms of the debenture deed.

"It has occurred to the writer to peruse debenture deeds in which the company covenants with the trustees to mortgage French leaseholds in ignorance of the French law, which confines the creation of a mortgage to realty and fixtures. Other such deeds purport to grant a 'floating charge' on French assets. No such charge is possible in France, if only because under French law chattels can be charged only by way of pledge involving delivery, actual or constructive, to the pledgee. In one instance, a large manufacturing company, having important works in France constituting the bulk of its assets, purported to give a 'floating charge' to its debenture-holders. Nothing was done for some considerable time to perfect this charge on the French assets, or even to enquire whether such a charge was possible under French law. Later on, when the company realised that the security as it stood was non-existent as far as the French assets were concerned, it became a serious problem to ascertain what security could be given in France which would most nearly approximate to the terms of the deed. Ultimately the company gave a mortgage to the trustees on the real property; an assignment by way of guarantee was recorded in their favour against the patents; and the company purported to give a pledge of the raw material and stock-in-trade, delivery of which was symbolised by the handing of the warehouse key to the trustees. The validity of this pledge was, however, very doubtful, and the securities taken together were not even remotely equivalent, as is easily seen, to a 'floating charge.'

"In another instance a company had given a charge, in the ordinary form of an English mortgage, purporting to convey the legal title of the (French) mortgaged property to the trustees. In a French mortgage, however, the title to the property is never conveyed, either in form or in reality, to the

mortgagee, but simply involves a charge which is registered in the office of the Registrar of Mortgages, as a lien upon the property, the title and the free disposition of which remains in the mortgagor.

"All these differences of legislation point to the importance for English companies, before purporting to issue debentures charged upon their French assets, of carefully ascertaining the conditions upon which such a charge can be perfected; otherwise they run the risk of French creditors of the company obtaining charges upon the property which would rank above such debenture charge, and the trustees might find themselves unable to enforce the security in France at all." The recent case of *In re Maudslay* illustrates our learned contributor's warning.

French Criticism of English Bankruptcy Law.—The Society is indebted to the *Société de Législation Comparée* for copies of a number of foreign codes and other interesting publications. Among the volumes so presented is one on bankruptcy law in England, with an introduction, historical and critical, by M. Léon Say. In sketching the history of the legislation—for the jurisdiction is nearly all statutory—M. Léon Say justly remarks that we in England have passed from the extreme of rigour to the opposite extreme of laxity. Indulgence to debtors reached its high-water mark under the Act of 1869, and resulted in a state of things which was a disgrace to the country and little short of an encouragement to fraud. We have changed all that now.

Not the least merit of the Act of 1883 is that it has for the first time discriminated between insolvency brought on by misconduct and insolvency brought on by misfortune, and tempered its penalties accordingly: some approximation towards an ideal justice. Furthermore, the Act has in its system of official administration recognised that insolvency is not a matter which concerns merely the debtor and his creditors, but which concerns the whole community, and more particularly the trading portion thereof. These are the two principal contributions of the Act to the edifice of Bankruptcy Law which has been so long a-building. Contrasting our system with that of France, M. Léon Say remarks: "Mais à la différence des lois du continent, la législation anglaise ne prononcé pas des peines contre les personnes qui se rendent coupables de négligences dans l'exercice de leur profession, ou qui abusent du crédit." Is this quite correct? A trader not keeping proper books of account is an offence in bankruptcy, and that form of abusing credit which consists in contracting debts without any reasonable expectation of being able to pay them is certainly provided for. M. Léon Say makes another point. Why should the right to present a bankruptcy petition be dependent on the petitioner or petitioners having a debt of £50 to support it? The idea seems to have been that to set the statutory machinery in motion there ought to be default in payment of a substantial sum; but, as M. Léon Say acutely remarks, non-payment of a small debt is really better evidence of insolvency than non-payment of a large one. In the analogous case of

winding up a company it is worthy of observation that the legislature has not fixed any sum to qualify for presentation of the petition, though it has made non-compliance with a demand for payment of a debt of over £50 conclusive evidence of the company's inability to pay its debts.

Legislation in the United States.—*The State Library Bulletin*, issued by the University of the State of New York, contains the annual review of the legislation of the United States. The summary for 1899 relates to 42 States, and epitomises no fewer than 5,094 Statutes. Of these, 470 relate to taxation and finance, 410 to education and cognate matters, 762 to the administration of justice, 753 to State and local government, and 303 to agriculture. Much of the legislation is of a kind with which we are familiar. Several States have abolished the doctrine of common employment. We hear much of an eight hours' working-day; in some States it is a reality. Not to mention States such as California and West Virginia, where eight hours are declared to be a day's work on all public works, Colorado has established an eight hours' day in mines and smelting-furnaces, except in cases of emergency, and the Missouri Legislature has passed a similar enactment as to all mines, other than coalmines, of a depth of two hundred feet or more. The war against industrial and commercial trusts is briskly carried on; and besides the Federal Anti-Trust Act, twenty-nine States and Territories have specially framed laws for the prohibition of such trusts. It is interesting to note that many States, in order to cope with the arrears of appeals—a general difficulty in America from the Supreme Court downwards—have decided to increase the number of their judges, or to establish an intermediate Court between the Supreme Court and the District Courts. Colorado and Missouri have passed laws making a majority of three-fourths of a jury effectual in civil cases. In an Act intended to strengthen the law as to defamation, California has introduced a startling innovation: it has made it a misdemeanour to publish portraits of residents of the State, except public officers and criminals, without the written consent of the person portrayed.

Some interesting details are given as to the spread of the Torrens system of land registration, which was first adopted by the State of Illinois in 1895. Declared unconstitutional by the Supreme Court, the Act was replaced in 1897 by a new law, the constitutional character of which was upheld. The law is operative in such counties as by popular vote accept it, and as yet it has been accepted by Cook County alone. In Ohio the Torrens system was adopted in 1896; the law was declared unconstitutional in 1897; and it was repealed in 1898. California adopted the system in 1897, and Massachusetts in 1898. We note some attempts to arrive at a just and scientific system of taxation which will be of interest to economists. Montana during the present year created a commission to enquire into the system of taxation, and report to the Legislature in 1901.

Another characteristic of recent legislation is the adoption in many

States of a Bill of Exchange Act, agreeing in the main with the English Act. The Legislatures of several States have struck out new lines by encouraging certain forms of scientific research. Thus Oregon has created the office of State Biologist, whose business is to investigate the animal resources of the State, and the development of such as have economic value. Wisconsin and Michigan and Texas have created a permanent tax commission, intended, among other things, to obtain information, statistical and otherwise, as to the incidence and effects of revenue laws. Wisconsin also has created a commission of taxation, whose business is to collect information with the aid of the local officers.

Some of the most novel Acts relate to marriage. "A measure making the passing of a medical examination a pre-requisite to obtaining a marriage licence passed the North Dakota Senate, but failed of enactment." Similar measures have recently been introduced in a number of legislatures. A Michigan Act provides that no person who has been afflicted with syphilis or gonorrhœa and has not been cured of the same shall be capable of contracting marriage. The penalty fixed by the Act is a fine of \$500 to \$1,000, or imprisonment for not more than five years, or both.¹

The Australian Federation Scheme.—The Australian Federation Bill, which we print in this number of the *Journal*, and which will shortly come before Parliament, has been framed with the Canadian Act as a model; but it differs in many respects from the measure of 1867. The effect of ss. 91 and 92 of the latter is to give the Dominion Parliament jurisdiction over all matters not specially assigned to the local legislatures. On the other hand, s. 107 of the Australian measure reserves "every power of a Parliament of a colony," "unless it is expressly vested in the Parliament of the commonwealth, or expressly withdrawn from the Parliament of the State." As Dr. Westerkamp (*Staatenbund und Bundesstaat*) points out (p. 140), the Canadian and Mexican constitutions are exceptional in giving to the central Parliament all powers not expressly given to the local legislative bodies. The following statement shows, side by side, the powers expressly given to the Dominion Parliament and the Australian Federation Parliament:

CANADA.

1. The Public debt and property.
2. The regulation of trade and commerce.
3. The raising of money by any mode or system of taxation.
4. The borrowing of money on the public credit.

AUSTRALIA.

1. Trade and commerce with other countries and among the States.
2. Taxation; but so as not to discriminate between States or parts of States.
3. Bounties on the products or export of goods; but so that such bounties shall be uniform throughout the commonwealth.
4. Borrowing money on the public credit of the commonwealth.

See as to such legislation, *L'Aryen, Son Rôle Social*. By G. de Lapouge, p. 504.

CANADA.

5. Postal service.
6. The census and statistics.
7. Militia, military and naval service, and defence.
8. The fixing of, and providing for, the salaries and allowances of civil and other officers of the Government of Canada.
9. Beacons, buoys, lighthouses, and Sable Island.
10. Navigation and shipping.
11. Quarantine and the establishment and maintenance of marine hospitals.
12. Sea-coast and inland fisheries.
13. Ferries between a province and any British or foreign country, or between two provinces.
14. Currency and coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings banks.
17. Weights and measures.
18. Bills of exchange and promissory notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians, and lands reserved for the Indians.
25. Naturalisation and aliens.

AUSTRALIA.

5. Postal, telegraphic, telephonic, and other like services.
6. The naval and military defences of the commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.
7. Lighthouses, lightships, beacons, and buoys.
8. Astronomical and meteorological observations.
9. Quarantine.
10. Fisheries in Australian waters beyond territorial limits.
11. Census and statistics.
12. Currency, coinage, and legal tender.
13. Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money.
14. Insurance, other than State Insurance; also State Insurance extending beyond the limits of the State concerned.
15. Weights and measures.
16. Bills of exchange and promissory notes.
17. Bankruptcy and insolvency.
18. Copyrights, patents of inventions and designs, and trade marks.
19. Naturalisation and aliens.
20. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
21. Marriage.
22. Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.
23. Invalid and old-age pensions.
24. The service and execution throughout the commonwealth of the civil and criminal process and the judgments of the Courts of the States.
25. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States.

CANADA.

- 26. Marriage and divorce.
- 27. The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.
- 28. The establishment, maintenance, and management of penitentiaries.
- 29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.

AUSTRALIA.

- 26. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.
- 27. Immigration and emigration.
- 28. The influx of criminals.
- 29. External affairs.
- 30. The relations of the Commonwealth with the islands of the Pacific.
- 31. The acquisition of property on just terms from any State or person for any purpose in respect of which The Parliament has power to make laws.
- 32. The control of railways with respect to transport for the naval and military purposes of the Commonwealth.
- 33. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State.
- 34. Railway construction and extension in any State with the consent of that State.
- 35. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.
- 36. Matters in respect of which this Constitution makes provision until The Parliament otherwise provides.
- 37. Matters referred to The Parliament of The Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.
- 38. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia.

CANADA.

AUSTRALIA.

39. Matters incidental to the execution of any power vested by this Constitution in The Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judiciary, or in any department or officer of the Commonwealth.

It is to be borne in mind that the classes enumerated in s. 91 of the British North America Act do not cut down the powers given to "make laws for the people and the good government of Canada."¹ It is evident that there is dissatisfaction with the clauses which propose to abridge greatly the right of appeal to the Judicial Committee of the Privy Council. There are obvious objections to altering provisions which have been submitted by referendum to the Colonies. These objections do not apply to the first eight clauses, and in particular Clause 2, which provides that the Crown shall be bound by the Act.

French Penal Settlements.—The French system of penal settlements, according to an article in the *Revue Générale du Droit*, seems far from a success. The transportation of habitual criminals naturally presents itself as a convenient way of purging the French capital of its criminals, raising the criminal, and "developing" a colony. In furtherance of these ends, the French Government relies on two principles: (1) the attractions of property, and (2) the regenerating influences of domestic life. It therefore makes grants of lands to the convict ("concessions") for farming purposes, supplies him with agricultural implements and food for six months, and trusts to the sense of proprietorship and stimulus of self-interest to turn him into an industrious colonist.

What is the result? The convict takes possession of his acres, instals himself in the cottage, "crosses his arms," to use the French expression, and lives on the six months' maintenance granted him; then, having enjoyed some months of agreeable relaxation in a comfortable house, he listens tranquilly to the sentence re-consigning him to the penitentiary. The cunning ones prolong their holiday by pretending to work and exercising the pick-axe vigorously when the inspector comes round. Marriage seems equally illusory as a regenerating influence. The State on its part does all it can to smooth the matrimonial path—gives the bride a complete trousseau and thirty months' maintenance, and the husband a further subsidy of 150 francs to start the *ménage* with.

Despite these attractions, the marriages come to less than 5 per cent., and even in this small proportion of cases the convict's impelling motive is stated to be, not the desire of becoming a model husband, but of possessing himself of the 150 francs subsidy. An even more discreditable

¹ Lefroy's *Legislative Powers in Canada*, pp. 308-9.

motive frequently lurks behind. In a country where the disproportion between the sexes is so great as in a penal colony, women are at a premium. Thus a wife—sure of finding a source of profit in prostitution—comes to be regarded as the best part of the convict's "concession," and is too often taken for what she can earn. Coleridge must have had penal settlements in his mind when he remarked that "the world is not a goddess in petticoats, but the devil in a strait-waistcoat."

Legal Education for the Empire.—Lord Russell of Killowen, whenever he speaks, speaks *urbi et orbi*; and it is to be hoped that the striking remarks which he recently addressed to the law students of Nottingham will come home to all lawyers throughout the British Empire.

"There never had been a time," said the Lord Chief Justice, "nor a combination of circumstances so favourable to the establishment of a great law school or legal university as the time and the occasion and the circumstances of to-day. The empire of the Queen extended over a great part of the surface of the globe. She could claim as self-governing colonies or dependencies a vast extent of territory and of population, all governed under systems of law partaking of the great systems of law of other civilised countries of the world. In Canada there was the Code Napoléon, modified by local custom and by imperial and legal legislation; at the Cape of Good Hope there was the Dutch law, modified by local custom and by imperial legislation, and by Acts of the local Legislative Assembly; in Egypt, of which this country had become in fact the dominant director, there was a mixed law, largely French, partly English. They ought surely, in such circumstances as these, to do what they could to direct to these shores and to the schools of learning here students from all this vast field of enterprise and activity. When they got here, the country ought at least to be able to give them some instruction in the laws which they had to administer in the land from which they came, and to which they went again to lead their lives of labour and of usefulness. Yet the system of law in this country was so deficient that although students came here from India, where there was Mohammedan law, modified by imperial law and by the acts of the Legislative Councils, this country had no mental food to offer them, and they were sent back as empty-handed as they came. It could not be too strongly insisted upon that if these men came to this country, whether they were British subjects or merely foreigners living in British dependencies, they should be made acquainted with the systems of law of this country and the character of its institutions, so that they might go forth from these shores voluntary, and perhaps unconscious, missionaries to spread our ideas of popular government and civil rights and general constitutional liberty."

Contradictory Versions of Statute.—In the latest number which has reached us of the *Rapports Judiciaires de Québec*, a case is reported involving a curious point of construction. The charter of the town of Lévis decrees, it appears, in the French text or version that the qualification of councillors

shall be \$1,000. The English text or version, on the other hand, declares that the qualification shall be \$5,000. Both texts being equally clear and precise, which, in such a case, is to prevail? It is a well-settled rule of law that in a case of difference the construction is to be adopted which best fulfils the intention of the Legislature, and attains the end for which the statute was passed; but this rule of law does not solve the difficulty, for *non constat* whether a high or a low qualification in such a case does best fulfil the intention of the Legislature. The compass of its course thus lost, the Court arrived at the conclusion that the English and French versions of the statute had an equal force and cancelled one another, and accordingly that the charter of Lévis fixed no qualification at all. This is legal logic with which it is difficult to quarrel, yet it obviously defeats the intentions of the Legislature.

Undue Preference as to Colour.—Among the cases reported in a recent number of the Reports of Queen's Bench at Montreal is one—*Sparrow v. Johnson*—relating to the right of ticket-holders and the exclusion of coloured people. The plaintiff, a coloured man, had purchased and paid for two tickets for "orchestra chairs" at a performance at the Academy of Music in Montreal. On asking to be admitted he was refused. He was offered a seat in another part of the building, but the ushers declined to allow him to sit in the orchestra seats. For this refusal he brought an action. Both the judge of first instance and the Court above decided in his favour. The former put his decision on the dubious ground that "the defendants had no right to make any regulation excluding negroes from the theatre or any part of it, and that any such regulation was and is unreasonable." The Court above naturally declined to base their decision on these reasons. "Nous n'adoptons pas ces raisons, non plus l'assimilation, pour la décision de la question d'un théâtre à une auberge ou un hôtel." It was enough to say that the tickets had been sold subject to no conditions as to colour. It will be interesting to watch the development of jurisprudence in countries where races of different colour come more and more in contact.

The Congo Codes.—We have received M. Lycoups' *Codes Congolais et Lois Usuelles*, a handy volume in which all the treaties affecting the Congo State, as well as the laws in force there, are given in full. How rapidly legislation in the young State is increasing appears in the fact that M. Lycoups' volume consists of nearly six hundred pages in double columns. Those who are engaged in amending the laws of our colonies in West Africa, and in particular Colonel Lugard's legal coadjutors in Nigeria, would do well to consult it. They might gather hints as to expressing succinctly and clearly rules to be applied by travellers, merchants, and soldiers. The laws are models of brevity and condensation. The regulations affecting the natives are full of the spirit of humanity, and it is difficult to believe that cruel acts of which we have heard were committed within the territory

of a State so anxious, to judge by its laws, to protect the aborigines. The law of November 8th, 1888, regulating contracts of service with natives, is conceived with the most humane intentions. But to those familiar with the abuses connected with the truck system, it must seem strange that the law should permit payment, without due safeguards, in kind or merchandise. "Le payement en nature pourra remplacer en tout ou en partie le payement en numéraire, si le maître y est autorisé par le contrat ou s'il y a accord entre les parties," etc.

Perjury in Bengal.—In *The Trial of Shama Choran Pal*—a small volume published in this country, containing a report of a remarkable trial at the Howrah Sessions of a Hindu accused of the murder of a Brahmin—occur some passages which almost suggest that each community should have its own rules of evidence, its own presumptions *de jure* and *de facto*. One of the chief witnesses for the prosecution was the wife of the murdered man. Part of her story was that, though on good terms with her husband, she was in the habit of eating her evening meal by herself, because her husband would often come home late, and that she did so on the night of the murder—an account not improbable according to Western usages. The counsel for the defence, the late Mr. M. Ghose, argued that this was altogether unlikely. "I ask you (the jury) to consider how far it is probable that a Hindu wife who is on good terms with her husband would ever think of dining and going to bed before her husband returned home? Such a thing may happen in some instances, but you will hesitate to believe that it should have been the ordinary practice in the family."

Here is another striking passage, relative to evidence given by children in Bengal: "It is now a common trick in this country, in false cases, not only to select children as false witnesses, but to select them from among the relatives of the accused persons. . . . Your own experience will tell you that where a man is really guilty of a crime, his own relatives will tell any number of lies to save him rather than come forward to tell the truth; and you may fairly and legitimately presume that if a relative comes forward to give evidence against the prisoner, that fact in itself in this country is cogent evidence to show that the relative himself has some sinister object to serve. . . . You must be aware of the numerous cases already on record, with evidence subsequently shown to be false, of children swearing away their fathers' lives."

Military Courts.—Some indirect effects of the Dreyfus case may be noted. Dr. Speyer, of Brussels, has published in a recent number of the *Revue Politique et Parlementaire* an interesting study on the reform of military jurisdiction in Belgium. Until lately the procedure and composition of Military Courts were the same as in France. But, no doubt influenced by the Dreyfus case, the Belgian Parliament lately made several important changes, the chief being the introduction of a lawyer as a member of the Court. "La présence d'un juriste au milieu des juges militaires,

en faisant pénétrer parmi une conception différente du rôle de la justice et un sens plus net de l'indépendance des juges, assurera aux uns une liberté plus complète, constituera pour les autres un frein contre de dangereuses habitudes, et donnera à tous, enfin, une notion plus juste de leur devoirs." The civil member is not to be a special judge, doing nothing else than sit on courts martial; he sits as a legal assessor with the military members of the Court, which is presided over by a soldier.

Dr. Speyer is not satisfied with the position assigned to the civil member, who, it is predicted, will be the "témoin attristé des maladresses qu'il ne saurait prévenir." The assessor, legal or otherwise, under no system appears to have a great future. On the other hand, as is pointed out, *tribunaux échevinaux*—that is, by judges *d'occasion* under the presidency of a professional judge—have proved a great success in Germany, Norway, and certain Swiss cantons. Many Continental lawyers think that they combine all the advantages of a jury, with few of its disadvantages.

Legitimation by Subsequent Marriage in Queensland.—The Colony of Queensland has, by an Act sanctioned at the end of last year, adopted the principle of legitimation by subsequent marriage. The principal section runs as follows:

Any child born before the marriage of his or her parents (and whether before or after the passing of the Act), whose parents have intermarried, or shall hereafter intermarry, shall be deemed on the registration of such child as hereinafter provided to have been legitimated by such marriage from birth, and shall be entitled to all the rights of a child born in wedlock. Registration involves a statutory declaration by the husband that he is the father of his wife's illegitimate child.

Legitimation *per subsequens matrimonium* had its origin in a constitution of Constantine. "It enacted," says Mr. Irvine, "that children born in concubinage—a relation recognised by social customs and not regarded with censure—whose parents might have been lawfully married at the time of the birth of such children should be legitimated by the subsequent marriage, provided the man had not already children by a lawful wife. Justinian abolished this restriction, enacting that the law should apply whether the father had legitimate children or not. The children so legitimated were subjected to the *patria potestas*, and entitled to all the rights of lawful children." It is observable, however, that legitimation *per subsequens matrimonium* did not, by Roman law, extend to bastards generally, but was strictly confined to the offspring of the irregular form of marriage known as concubinage. The canon law went further, and legitimated all bastards when their parents afterwards married, provided the father and mother were capable of contracting marriage at the date of the child's conception. In the case of both civil and canon law the object of the law was to encourage persons living in concubinage to marry. Legitimation *per subsequens matrimonium* obtains in Scotland, France, Holland, and other countries, whose system is based on the civil law,

English law, on the other hand, makes it an indispensable condition of a child's legitimacy that it shall be born after lawful wedlock ; and Blackstone—"the somewhat indiscriminate eulogist of every anomaly of our law," as Lord Justice James once described him—pronounces this rule as "very much superior to that of the Roman." Starting with the assumption that the main end and design of marriage "is to fix upon some person the care of the child," the points which the author of the *Commentaries* makes against legitimation *per subsequens matrimonium* are four :

- (1) The uncertainty of proof that the issue really was begotten by the same man. (French law meets this by requiring that the children shall be recognised by their parents ; so does the new Queensland law.)
- (2) That it leaves it to parents to bastardise or legitimise at pleasure, and so opens the door to fraud.
- (3) That a man may remain a bastard till forty and then be legitimated, whereby the main end of marriage—the protection of infants—is totally frustrated.
- (4) Any number may be legitimated twenty years after their birth, which is a discouragement to the matrimonial state.

The last of these reasons is the most tangible. Our law, it may be observed, is already indulgent to human frailty to this extent, that it does not bastardise the child if it be born, though not begotten, in lawful wedlock.

The New Queensland Criminal Code—Some Points in the Draft Bill.—

In making their Report on the Draft Criminal Code Bill submitted to them, the Committee of Reference drew the special attention of the Legislature to certain clauses which are innovations on the existing law. These clauses are interesting as illustrating the drift of modern legislation on certain points, and as such may be quoted :

Public Attacks on Religious Creeds (Clause 210).—Any person who, with intent to offer offence to any of Her Majesty's subjects by words publicly spoken, or by any writing, sign, or visible representation publicly exhibited, holds up the doctrines or practices of any religious faith to public derision or contempt, is guilty of a misdemeanour, and is liable to imprisonment for one year. (Omitted from Act.)

Aiding Suicide (Clause 315).—Any person who—

- (1) Procures another to kill himself, or
- (2) Counsels another to kill himself, and thereby induces him to do so, or
- (3) Aids another in killing himself,

is guilty of a crime, and is liable to imprisonment with hard labour for life. (Passed.)

Disorderly Conduct in Parliament (Clause 56).—Any person who advisedly—

- (1) Disturbs either House of Parliament while in session, or

- (2) Commits any disorderly conduct in the immediate view and presence of either House of Parliament while in session, tending to interrupt its proceedings or to impair the respect due to its authority,

is guilty of a misdemeanour, and is liable to imprisonment for three years. (Passed.)

Maintenance of Litigation (Clause 141).—Any person who, having no valuable interest in the subject-matter of a litigation, assists the plaintiff in the litigation by providing money for carrying it on, is guilty of a misdemeanour, and is liable to imprisonment for two years.

It is a defence to a charge of the offence defined in this section to prove that the plaintiff in the litigation was a relative of the accused person, or stood in some relation to him which rendered the giving of such assistance reasonable and proper, or that the assistance was given without any desire to harass the defendant, and in the honest belief that the plaintiff was seeking redress for some wrong or breach of contract sustained by him and was unable to obtain it without such assistance. (Omitted ; also a similar clause as to champerty and buying and selling disputed titles.)

Obtaining Credit by Fraud (Clause 436).—Any person who, when incurring any debt or liability, obtains credit by a false pretence or by means of any other fraud, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years. (Omitted from Act.)

Clauses as to hunting deer in enclosed land, taking or killing hares in a warren in the night-time, stealing animals at night with violence, snaring or setting engines for taking deer or hares, and injuries to trees, shrubs, etc., were omitted.

"Actor sequitur Forum Rei."—One or two points of interest arose in *Christien v. Delanney*, decided lately before Macpherson J. and Stevens J. in the High Court at Calcutta. J. P. Delanney, son of a French subject who had settled in Comilla, in British territory, was born and resided there, and left a son, P. Delanney, who also resided there, and who called himself a British subject. By the will of J. Delanney, P. J. Delanney was to be appointed executor. The will directed monthly payments of one hundred rupees to Madame Montie, who resided at Chandernagore, in French territory in India. The universal legatee of Madame Montie brought a suit in the Chandernagore Court against the executor. He did not appear, though he was served ; and judgment was given against him in his absence—a judgment perhaps warranted by some of the recent decisions of the Cour de Cassation in *Forgo's* case (see Mr. Sewell's recent book thereon). Upon this judgment a suit was instituted in an English Court. It was dismissed, and the High Court, of course, upheld this decision. It was argued that, though a British subject, Delanney still, according to French law, owed allegiance to the French Government. "No authority has been shown us," said the Court, "for the contention that the Chandernagore Court has jurisdiction over him, even if he is a

Frenchman residing in British India, much less if he is a British subject domiciled there." So far as any point of law was involved, the case was substantially similar to *Gurdyal Singh v. Raja of Faridkott* (I.L.R. 22 Calc. 222; L.R. 21 I.A. 171), decided by the Judicial Committee.

Free Advocacy.—A correspondent calls attention to an article in a recent number of the *Preussische Jahrbücher* on "*Advokatur und Rechtsanwaltschaft*." Our correspondent quotes part of the conclusion :

At the end of 1898 an attempt was made at the instance of Justizrath Goldschmidt, the President of the Society of Solicitors at Berlin, to establish offices where legal advice might be had without payment. Adverse influences, however, nipped in the bud these efforts, so well calculated to further the interests of the profession. Moreover the example was not followed in any other place. This attempt nevertheless leads one to believe that there is making way, although slowly, the opinion that *Rechtsanwaltschaft* by no means fulfils its mission by simple representation of a party before the Court and the management of such-like legal matters, but that in order to maintain its position in the legal system it must devote itself to far higher aims. Offices for free consultation and the defence of accused persons without means would increase the social importance of the profession of attorney, and awake that spirit of unselfishness to which the French and Belgian Bars owe their power and their great dignity.

The Meaning of "Liquor."—What is liquor? Is ginger ale a liquor? This is a point which a Canadian Court has lately had to determine, not in the abstract, but under the Liquor Licence Act of the Colony, which forbids a licensee supplying a person, apparently under the age of twenty-one, with "any description of liquor whatever." Words get worn into strange meanings by the play of popular usage, just as stones do by the incessant action of the waves; and under this influence, liquor, whatever its original meaning, has come more and more to be a convertible term with intoxicating liquor, and that was what the Court held the Act meant. The case recalls the story of Mr. Justice Maule when he was asked by the bailiff who had sworn to give the jurymen "no meat or drink" whether he might give a jurymen some water. "Well," said the judge, "it is not meat, and I should not call it drink. Yes, you may." Preventatives for drunkenness are various. The Liquor Licence Act contains one which is worth noting. By this a wife, parent, etc., may give notice to any licensed hotel or saloon keeper not to deliver "intoxicating liquor" to the person having the habit of drinking intoxicating liquor to excess. If any person then, with knowledge of this notice, gives or sells the inebriate any liquor, he is to incur for every such act a penalty not exceeding \$50.

Privy Council Appeals.—Mr. A. Wood Renton sends the following addenda to his article on "Indian and Colonial Appeals to the Privy Council" (*Journal of Society of Comparative Legislation*, December, 1899).

INDIAN AND COLONIAL, ETC., APPEALS TO THE PRIVY COUNCIL.—The

following alterations in, and addenda to, the article on this subject in *Jour. Comp. Leg.*, N.S., No. iii., p. 345, may be noted :

BERMUDA.—At p. 355, col. 2, delete reference to "Order in Council of July 18th, 1894."

BRUNEI (at p. 359) and SOMALILAND (at p. 376).—The Brunei Order in Council, 1890, and the Somali Order in Council, 1889, are repealed by the Somali and Brunei (Repeal) Order in Council, 1900 (*Lond. Gaz.*, 1900, p. 281).

GUERNSEY.—At p. 373, col. 2, delete reference to "Parl. Rep., 1834 [323], Dec. 20th, 1885."

JERSEY.—At p. 369, note Order in Council of May 19th, 1831, in Stat. R. and O., 1899.

NIGER COAST PROTECTORATE (NOW PROTECTORATE OF SOUTHERN NIGERIA).—As from Jan. 1st, 1900, the Africa Order in Council, 1889, no longer applies to Southern Nigeria. (Order in Council, 1899; *Lond. Gaz.*, 1900, p. 71, *q.v.* for present juridical arrangements.)

Colony, Possession, etc.	Authority under which appeals are tendered.	Appealable amount.	Limit of time within which leave to appeal must be asked.
NORTH-EASTERN RHODESIA.	North-Eastern Rhodesia Order in Council, 1900 (<i>Lond. Gaz.</i> , 1900, p. 901), Arts. 28, 29.	Appeal lies from High Court of North-Eastern Rhodesia in civil matters when the amount or value in dispute exceeds £500.	Appeal to be brought within such time and in such manner as regards form and transmission of appeal as rules of procedure made by her Majesty in Council may prescribe.

NORTHERN NIGERIA.—The Africa Order in Council, 1889, no longer (as from Jan. 1st, 1900) applies to Northern Nigeria. (Northern Nigeria Order in Council, 1899; *Lond. Gaz.*, 1900, p. 69, *q.v.* for present juridical arrangements.)

SOMALILAND.—See BRUNEI, *supra*.

The Size of Colonial Statutes.—Through the courtesy of the Colonial Office we have received the following statement, prepared by the librarian, showing the remarkable variety in the size of the Statutes of various colonies :

IMPERIAL STATUTES { Annual ... about $9\frac{1}{2} \times 6\frac{1}{4}$.
Local Acts " $10\frac{1}{2} \times 7\frac{1}{2}$.
Revised ... " $10 \times 6\frac{1}{4}$.

COLONY.	SIZE OF STATUTES.
NORTH AMERICAN—	
Canada	$9\frac{3}{4} \times 7$.
Ontario	$9\frac{1}{2} \times 7\frac{1}{4}$.
Quebec	$9\frac{1}{2} \times 6\frac{1}{2}$.
Nova Scotia	Revised $9\frac{1}{4} \times 6\frac{1}{2}$. Annual $8\frac{1}{4} \times 6\frac{1}{4}$.
New Brunswick	Revised $9\frac{1}{4} \times 6\frac{1}{2}$. Annual $9 \times 5\frac{1}{2}$.
Prince Edward Island	$8\frac{1}{2} \times 6$.
British Columbia	$10\frac{1}{2} \times 7$.
Manitoba	Revised $10 \times 6\frac{1}{2}$. Annual $9\frac{1}{2} \times 6\frac{1}{2}$.
North-West Territories	$8\frac{1}{4} \times 5\frac{3}{4}$.
Newfoundland	Consolidated $10 \times 6\frac{1}{2}$. Annual $9\frac{1}{4} \times 6\frac{1}{4}$.
AUSTRALIAN—	
New South Wales	Revised $9\frac{3}{4} \times 6\frac{1}{4}$. Annual (lately reduced) $11 \times 8\frac{3}{4}$.

COLONY.	SIZE OF STATUTES.
AUSTRALIAN (continued)—	
Victoria	11 x 7½.
Queensland	Revised 9½ x 6½. Annual 9½ x 6.
Tasmania	Revised 10 x 6½. Annual 12½ x 8½.
South Australia	11 x 8.
Western Australia	10½ x 7½.
New Zealand	10½ x 8.
Fiji Islands	1 Vol. (1875 to 1878) 9½ x 6½. Annual 13 x 8.
Western Pacific High Commission	13 x 8.
British New Guinea	Collected Edition 9½ x 6. Annual 13 x 8.
WEST INDIES—	
Jamaica	10½ x 8½.
Turk's Islands	13 x 8.
Cayman Islands	10½ x 8½.
British Honduras	Consolidated 10 x 6. Annual 13 x 8.
British Guiana	Revised 9½ x 6½. Annual 13 x 8.
Bahamas	Revised 9½ x 6½. Annual 13 x 8.
Trinidad and Tobago	10 x 6 (Trinidad). 13 x 8 (Tobago).
Barbados	Revised 9½ x 6. Annual 13 x 8.
Windward Islands—	
Grenada	Revised 13½ x 8½. Annual 13 x 8.
Saint Vincent	Revised 10 x 6½. Annual 13 x 8.
Saint Lucia	Revised 10½ x 7½. Annual 13 x 8.
Leeward Islands—	
Antigua	Revised 11 x 7½. Annual 13 x 8.
Montserrat	13 x 8.
Saint Kitts—Nevis	Revised 10 x 6½. Annual 13 x 8.
Virgin Islands	13 x 8.
Dominica	Collected 11 x 7. Annual 13 x 8.
Bermuda	Revised 7½ x 6½. Annual 10½ x 7½.
Falkland Islands	13 x 8.
AFRICAN—	
Cape of Good Hope	Revised 7½ x 6. Annual 12½ x 8.
Bechuanaland Protectorate	13 x 8.
Southern Rhodesia	10½ x 8½.
Natal	9½ x 6½.
Saint Helena	13 x 8.
Sierra Leone	Collection 6 Vols., all different sizes; average 12½ x 8½. Annual 13 x 8.
Gambia	Collection 12½ x 8. Annual 13 x 8.
Gold Coast	Revised 9½ x 6. Annual 13 x 8.
Lagos	Revised 10 x 6. Annual 13 x 8.
Niger Coast Protectorate (Southern Nigeria)	Annual 20 x 15.
MEDITERRANEAN—	
Gibraltar	Revised 9½ x 6½. Annual 13 x 8.
Malta	13 x 8.
Cyprus	13 x 8.
EASTERN—	
Ceylon	Revised 10 x 6. Annual 10 x 6 (sometimes 11½ x 8).
Hong Kong	Revised 10½ x 8½ and 10 x 6½. Annual 13 x 8.
Labuan	13 x 8.
Mauritius	Revised 10½ x 6½. Annual 9½ x 6½.
Seychelles	10 x 6½ and 13 x 8.
Straits Settlements	Revised 10 x 6. Annual 9 x 6.
Federated Malay States	Various, mostly 10 x 6 and 13 x 8.

N.B.—The measurements of the Revised Editions are when bound.

Grenada has produced the most remarkable monstrosity ($13\frac{1}{2} \times 8\frac{1}{2}$), but it is nearly equalled by some other West Indian islands. As we have already pointed out, the most convenient size is $10 \times 6\frac{1}{2}$.

Private Property at Sea.—The latest number of the *Revue de Droit International et de Legislation Comparée* contains an article by Mr. Thomas Barclay on "The Inviolability of Private Property at Sea." The United States, the writer says, are in favour of it; England as strongly opposed. Both are actuated by their private interests. Napoleon Bonaparte thought no ruder shock could be given to England than to compel her to abandon her rights on the sea. Nelson was of the same opinion. He thought nothing could be more fatal to the maritime interests of his country than the adoption of the principle "Free ships, free merchandise." England's adherence or non-adherence to the principle of inviolability must, Mr. Barclay thinks, depend on the special circumstances of each war in which it engages. The considerations to be taken into account in a war with the United States would be quite different from those in a war with France or Germany. In the former case it might be to the interest of both parties to localise operations and to disturb transatlantic commerce as little as possible. In the latter, England might think that closing the high seas to all traffic by merchants of the enemy would be highly advantageous. England, it is often suggested, would profit by the inviolability of its commerce, seeing it is exposed to a combination of powers against it who might prevent its exercising sufficient protection over its commerce to render useless the employment of neutral vessels. But Professor Westlake has demonstrated, Mr. Barclay thinks,

que la mise de navires sous pavillon neutre que ne serait point effectuée bonafide, ne serait pas valable à l'égard d'un belligérant, et qu'il serait vite reconnu que pour les cargaisons transportées par des vaisseaux dont l'inscription aurait été uniquement déterminée par la guerre, les tarifs d'assurance seraient presque aussi élevés sous le pavillon d'un neutre que sous celui d'un belligérant.

Mr. Barclay's conclusion is that the exigencies of war necessitate the preservation of the power of destroying the forces of the enemy, and that this necessity will always prevent belligerents abandoning their right of seizing all the property of the enemy, whether it belongs to individuals or to the community, whenever it can help them in attaining their ends. All the ameliorations introduced have only had the result, so far as private property is concerned, of preventing reckless destruction and plundering, and of equalising the damage. Much to the same tenour is Captain Mahan's warning in the last number of *Harper's Magazine* against "signing away prerogatives sanctioned by long prescription, such as the seizure of so-called private property, embarked in mercantile adventure."

What is "Territory"?—It is not only in England that the existence of protectorates is giving rise to difficulties. A writer in the *Archiv für Öffentliches Recht* deals with the question, much debated, whether the

German patent law is in force in the *Schutzgebiete* of the Empire. The question mainly turns on the meaning of the word "inland." The writer argues that *Schutzgebiete*, having become purtenances of the Empire, are "*ausland*" as contrasted with "*inland*." The whole discussion shows that modern terminology as to the ambit or purview of laws—e.g. "territory," "realm," etc.—needs remodelling in the light of the facts connected with protectorates, spheres of influence, etc., and the exercise of foreign jurisdiction.

The Congress of Comparative Legislation.—The French Society of Comparative Legislation proposes to hold a Congress in Paris at the end of July and the beginning of August. We have received a copy of a report by Professor Saleilles on the objects of the Congress. They are comprehensive, and are thus defined :

1. Au point de vue de la conception de la science du droit comparé, définir d'après quelles méthodes il y aurait lieu de procéder aux trois fonctions qui en constituent l'objet propre, et qui sont, par rapport aux diverses législations en présence, la constatation, la comparaison et l'adaptation.
2. Au point de vue doctrinal, préciser le rôle du droit comparé comme méthode d'enseignement.
3. Au point de vue des solutions juridiques, rechercher dans quelle mesure les conclusions tirées du droit comparé peuvent et doivent être utilisées, soit par voie législative, soit par voie coutumière et doctrinale se traduisant par le procédé de l'interprétation judiciaire, soit par voie d'entente internationale.
4. Au point de vue de la pratique des affaires, rechercher et organiser des moyens d'entente pour l'information et la connaissance du droit étranger.

Some day the English Society may follow the example of the elder sister, but, as becomes youth, on a less ambitious scale.

Court for the Trial of High Crimes and Misdemeanours.—In the *Revue Politique et Parlementaire*, M. Lagresille contributes, *apropos* of political trials in France, an article on "*Les Hautes Cours de Justice en France, depuis la Révolution jusqu'à nos jours.*" He points out that almost all foreign constitutions make provision for a *haute jurisdiction*, charged with the trial of political offences, or offences committed by public personages. In Italy it is the Senate. Such is the case also in Spain. According to the Portuguese Constitution, the Chamber of Deputies has cognisance of offences committed by Ministers and Counsellors of State. The Chamber of Peers has cognisance of offences committed by members of the Royal Family, peers, and deputies. In the United States the corresponding Court is the Senate. Of course, with us, Parliament may deal with high crimes and misdemeanours. While here the ordinary tribunals, at all events in modern times, are alone invoked, it is not so in the case of some of the countries named by M. Lagresille.

The Hague Conference.—It may be interesting to state what has been done by the States represented at the Peace Conference at the Hague since the deliberations of last summer. All the twenty-six States there represented have signed the five conventions and declarations agreed to with respect to

international arbitration, the laws and customs of war, the Geneva Convention, and the prohibition of projectiles containing asphyxiating gas, etc., though some of the signatures are subject to unimportant reservations. But on March 15th the Dutch Ministry of Foreign Affairs was unaware of any Power having ratified the conventions. It may be added that the Arbitral Court cannot come into operation until nine States have ratified the Arbitration Convention.

Mr. Haldane's Proposal as to the Final Court of Appeal of the Empire.—

In an address which Mr. Haldane, Q.C., delivered the other day to the Scots Law Society, he threw out suggestions as to what should be a composition of the final Court of Appeal for the Empire.

He would add to them (the present members) three representative great lawyers from different parts of the Empire, giving them a sufficient but moderate salary from the Imperial Exchequer to compensate them for their general services, and leave it to the Colonies which they represented to make up the salaries to an amount sufficient to maintain the dignity and importance of the position. He would make these new Colonial representatives life peers in the House of Lords, so that they might sit there as well as at Downing Street, and he would thereby take the first step towards infusing new blood into that body, and making it a convenient Chamber for Colonial representation. In this way there would be one great Imperial tribunal sitting when necessary in two divisions, and hearing the appeals not only of Scotland, England, and Ireland, but of India and all the Colonies. The Colonies would take pride in such a body, because it would become in part their own. There was a larger view of Imperialism than that which was talked of at elections, and one which was less controversial. That view refused to recognise in the Crown and the system of Imperial defence the only features of our existence as an Empire. It might be that in the sphere of education, in the foundation which some were at present endeavouring to compass of an Imperial University, a new link could be added, but this at least Imperialists, such as he himself desired to be reckoned, held to be certain, that in the administration of justice and in the existence of a great but too scantily recognised central tribunal they had one of the most real bonds that could hold together the distant parts of the Queen's dominions in those relations which only a common heritage could give.

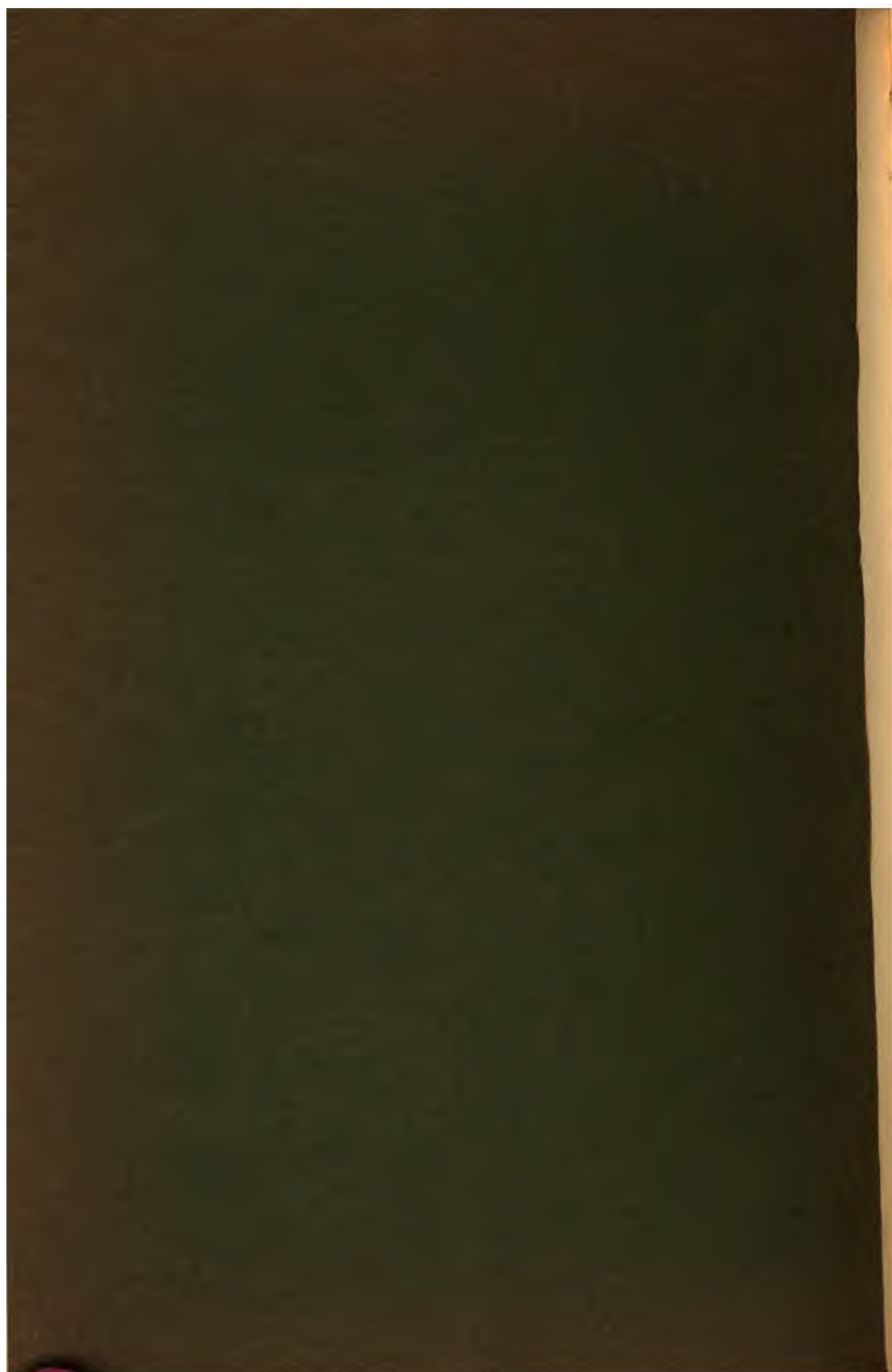
Injuries by Animals and the Law of Canada.—In Canada the law as to injuries by animals approximates closely to the law of France and of the Continental nations, and knows nothing of the English law of "Scienter." By Art. 1055 of the Civil Code of the Dominion, "Le propriétaire d'un animal est responsable du dommage que l'animal a causé soit qu'il fût sous sa garde ou sous celle de ses domestiques, soit qu'il fût égaré ou échappé." On the face of it, this article imports an absolute liability; but as interpreted in the light of Art. 1053 of the Code, fault on the part of the proprietor is an essential element of responsibility. The result is that it is open to the proprietor of an animal which has committed any mischief to show that he has done everything to prevent an injury, and that no fault, negligence, or imprudence is imputable to him. In a recent case in the Superior Court at Montreal, where a stableman had been kicked by a mare which

was not vicious, but only skittish or ticklish (*chatouilleuse*), an ingenious attempt was made to neutralise this doctrine by putting this dilemma: "De deux choses l'une; ou le propriétaire n'a pas pris toutes les précautions que la prudence commandait et alors il est en faute; ou il s'agit d'un animal tellement méchant que toutes les précautions imaginables pour l'empêcher de nuire sont inefficaces; et alors il est en faute par cela seul qu'il le conserve." In other words, the very fact that harm has been done postulates the existence of fault. But the Court very plainly exposed the fallacy: "Human affairs are not to be governed by syllogisms. It is no doubt true that every accident could be prevented if human beings could foresee every circumstance and event of life. Legal fault does not depend upon any such theoretical perfection of human intelligence." All that the law requires of a man is that he should exercise an intelligent foresight, but the standard of intelligence it exacts is that of the average man.

Gang Rape in India.—Rape under the Indian Penal Code is already heavily punished. The penalty is transportation for life; but even this has been found inadequate to deal with a very atrocious form of the offence—"gang rape"—where a number of men join together to violate a woman. The offence, according to a minute of Mr. Justice Wilkins, is prevalent only in certain districts of Eastern Bengal, and is committed in a peculiarly brutal and inhuman manner. The perpetrators have always been Mohammedans of the lower classes. Their victim is generally a young married girl. They wait till she is left unprotected, by the absence of her husband or parents, and they then attack her, and forcibly carry her off. The motive is not always the same,—at times it is revenge, at times merely the gratification of their own passions,—but the consequences to the victim are of course terrible and irreparable. The Legislative Council of India have now passed a clause for punishing with whipping (in addition to any other punishment) any member of such a rape gang who abets or commits a rape of this kind.

An English School of Law in Egypt.—By far the most interesting passage in the latest report by Mr. McIlwraith, the Judicial Adviser of the Egyptian Government, is the announcement that an English school of law has been established at Cairo. Hitherto only two languages were employed as mediums of instruction—French and Arabic; the native codes had not been translated into English, and the commentaries in use were the works of French and Belgian lawyers. Now, however, provision has been made for an English section in the Khedivial school of law on lines similar to those of the French section. Instead of being dependent solely on French commentaries and French decisions, which are "often more misleading than helpful to the student of Egyptian law, which is gradually acquiring a distinct and separate individuality of its own," an authoritative commentary in English is to be published. The English section of the school of law is, says Mr. McIlwraith, "an accomplished fact"—though, by the way, the attendance is smaller than the attendance in the French section.

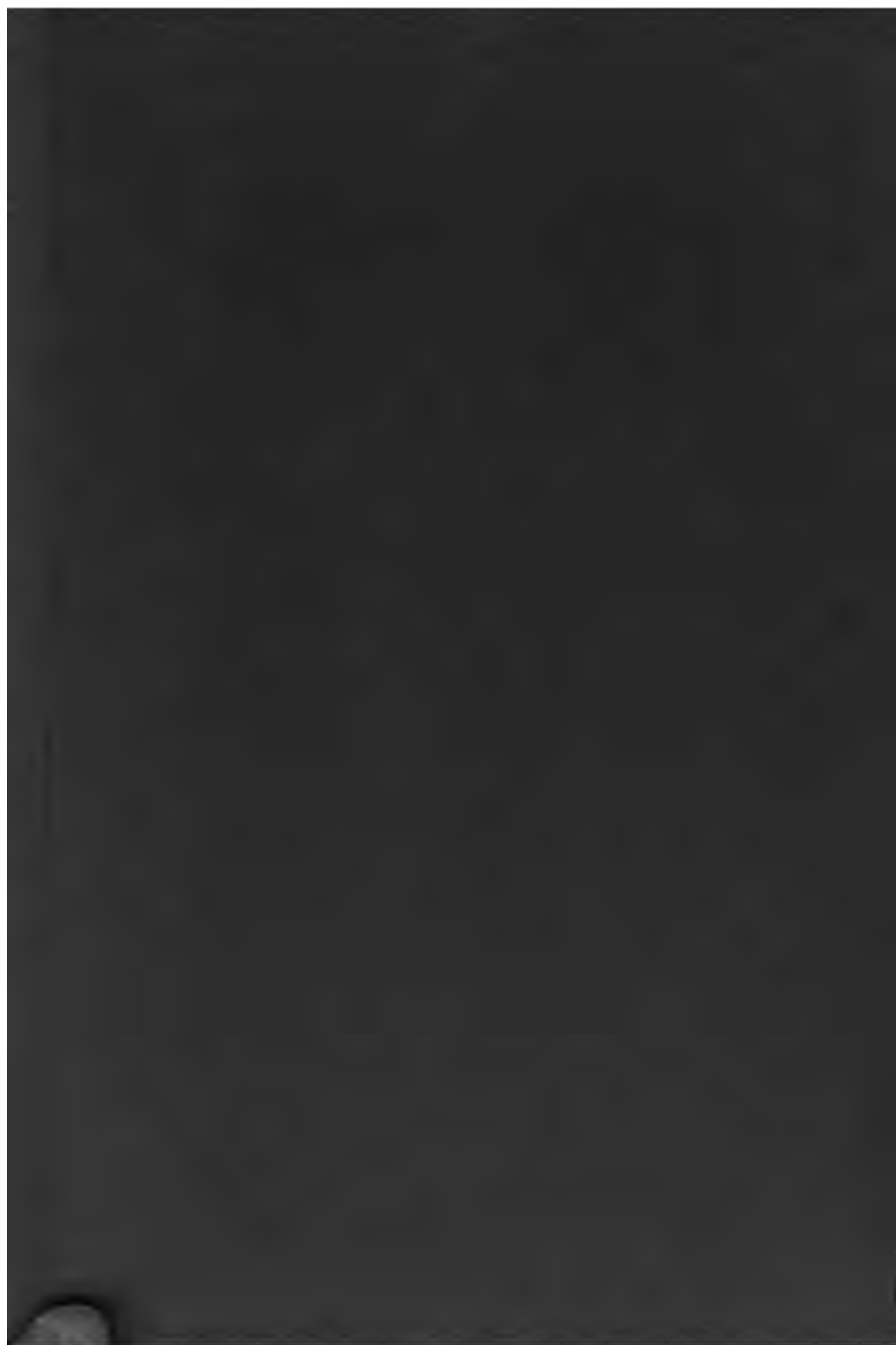




THE JOURNAL OF THE
SOCIETY OF COMPARA-
TIVE LEGISLATION.

NEW SERIES No. V.

AUGUST 1900.







The Right Hon. Lord Russell of Killowen.

Lord Chief Justice of England.

President of the Society of Comparative Legislation.

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of the House of England.

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Right Hon. Lord Russell of Killowen
 Lord Chief Justice of England.
 of the Society of Comparative Legislation

Death of the Lord Chief Justice of England.

WITH the deepest regret we learn, as the JOURNAL goes to press, of the death of Lord Russell of Killowen, the Lord Chief Justice of England. To the profession, of which he was the ornament and pride, to the country, which recognised in him a great advocate and judge, and to friends innumerable, his loss is irreparable. He died in the fulness of his powers, just when a new region of civic usefulness was opening before him, and at a time when the confidence reposed in him by other countries, no less than by his own, marked him out as a mediator in the disputes of nations. We little imagined, when, not many days ago, in response to our request, he handed us his portrait for reproduction in the JOURNAL, that he would never see it appear. It was his lot to be the foremost advocate of his generation; but whatever career he had chosen—soldier, statesman, ecclesiastic, or lawyer—he was destined to pre-eminence. As President of the Society of Comparative Legislation, he served it with unstinted zeal (one of the last letters which he dictated from his death-bed related to the Society's affairs), and he had a conception of its functions and its future which few but he could realise. During the last few weeks he was meditating an address, to be delivered by him as President of the Society, on "The British Empire as a Legal Unity." That, alas! is one of the many things lost to the Society by the disappearance of a masterly and generous spirit and a far-seeing and comprehensive intelligence.

⊙

JOURNAL
OF THE
SOCIETY OF COMPARATIVE
LEGISLATION.

EDITED FOR THE SOCIETY
BY
JOHN MACDONELL, Esq., C.B., LL.D.
AND
EDWARD MANSON, Esq.

‘ Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τὸ εὖ ὁρθῶς ἔχον ὁφθῇ καὶ τὸ
χρήσιμον. ’—ARIST. *Pol.* II. 1.

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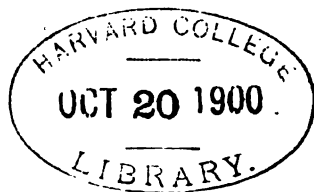
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CONTENTS OF No. 2, 1900.

	PAGES
1. THE RT. HON. LORD RUSSELL OF KILLOWEN, G.C.M.G., PRESIDENT OF THE SOCIETY OF COMPARATIVE LEGISLA- TION (PORTRAIT)	<i>Frontispiece</i>
2. COUNCIL AND EXECUTIVE COMMITTEE OF THE SOCIETY	198-200
3. STATUS IN CONNECTION WITH COLONIAL MARRIAGES BY THE RIGHT HON. LORD DAVEY.	201-204
4. DISCIPLINARY JURISDICTION OVER SOLICITORS BY HENRY EDWARD GRIBBLE, Esq.	205-213
5. THE SUPPORT OF WAR BY WAR BY JOHN S. RISLEY, Esq.	214-223
6. THE WEST INDIES AND CONFEDERATION BY WALWYN P. B. SHEPHEARD, Esq., M.A.	224-232
7. THE LAW OF SOUTH AFRICA BY W. F. CRAIES, Esq.	233-239
8. APPEALS UNDER THE COMMONWEALTH OF AUSTRALIA CON- STITUTION ACT BY ARTHUR R. BUTTERWORTH, Esq.	240-250
9. COMPARATIVE LEGISLATION IN BANKRUPTCY BY PROFESSOR RICHARD BROWN.	251-270
10. MODERN DEVELOPMENTS OF MOHAMMEDAN LAW BY SIR RAYMOND WEST, K.C.I.E.	271-275
11. THE SOURCES OF THE LAWS OF THE COLONIES BY W. HARRISON MOORE, Esq.	276-283
12. MODES OF LEGISLATION IN THE BRITISH EMPIRE: NEW- FOUNDLAND BY SIR J. S. WINTER, K.C.M.G.	284-288

	PAGES
13. RECENT LEGISLATION AS TO INEBRIATES IN ENGLAND AND THE COLONIES	289-293
BY ERNEST M. POLLOCK, ESQ., AND A. M. LATTER, ESQ.	
14. PRELIMINARY EXAMINATION OF PATENTS AND COMPULSORY LICENCES	294-318
BY A. WOOD RENTON, ESQ.	
15. NOBILITY IN ENGLAND	319-325
BY EDWARD MANSON, ESQ.	
16. THE SEIZURE OF THE <i>MASHONA</i>	326-341
17. THE NEW COMMERCIAL CODE OF GERMANY	342-347
BY G. H. B. KENRICK, ESQ., LL.D.	
18. CLASSIFICATION OF CRIMES IN MODERN CODES	348-354
19. SOME NOTES ON FOREIGN COMPANIES IN ENGLAND	355-358
BY ISRAEL DAVIS, ESQ.	
20. NON-CHRISTIAN MARRIAGE	359-387
BY SIR DENNIS FITZPATRICK, K.C.S.I.	
21. NOTES	388-405
Hostilities without War	388
Egyptian Companies	389
The Law of Nature	390
The Summary Punishment of Perjury in Gambia	391
Married Women's Property in Babylon	392
Animals and their Rights	393
Mining Leases and Subterranean Dragons in China	394
The Revision of Case Law in America	394
Railway Companies and Negligence	394
Hong Kong and the "Bully"	395
Codification of the Commercial Law of the Empire	395
Trusts in the United States	397
What is Neutrality?	397
The Historical School of Jurisprudence	398
Adoption in Indian Law	398
Pensions and the Doctrine of "Ultra Vires"	399
Englishwomen and Mohammedan Marriages	399
Law and Public Opinion	400
Heroic Social Remedies	401
Customs among the Jains	401
Reciprocity of Matrimonial Obligations	402
Medical Practice and the Sale of Quack Medicines	402
Judicial Statistics and the Colonies	403
The Congress of Comparative Law at Paris	404

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STATUS IN CONNECTION WITH COLONIAL MARRIAGES.

[Contributed by the RT. HON. LORD DAVEY.]

Objects of the Recent Bill.—The Colonial Marriages Bill introduced by Lord Strathcona was, on May 29 last, read a second time in the House of Lords, and has since passed through Committee and been read a third time. There was a division on the second reading and a large majority in favour of the Bill. The object of the Bill is to give validity for all purposes to marriages by a man with his deceased wife's sister contracted in a colony the law of which permits such marriages, and when both parties are domiciled in the colony.

The Bill raises questions of some legal interest, which were sure to arise when the Colonies acquired the right to make their own laws, as to status, marriage and legitimacy. What is the legal status in this country of the wife and offspring of such a marriage? It cannot, in the opinion of the present writer, be denied that the wife has the status of a wife for all purposes, except, possibly, that of a right to dower from real estate in England. The case of *Ilderton v. Ilderton* (2 H. Bl. 145) is an apparent decision in favour of her right to dower, but in that case the question seems to have been only as to a Scotch marriage between persons not incapable of marriage in England. It is now well established that *quoad solemnitates* the law of the place of the marriage governs, but as regards the capacity to contract the law of the domicile prevails. There is no actual decision on the point, but it is conceived that a woman who was incapable of contracting the marriage by the law of England, could not claim dower as widow of her deceased husband. It is thought that the *lex rei sitæ* would be held to prevail.

Succession to Personal Estate.—As to the children, also, they are legitimate for all purposes of succession to personal estate *ab intestato*, or under the description of children of their father or mother in a will. This was generally accepted in the course of the debate in the House of Lords; and as regards the succession to the personal estate of their own parents, there has never, so far as the writer knows, been any dispute. But there has been great difference of opinion, whether a person legitimate according to the law of

his parents' domicile could succeed as the child of his parents to the personal estate of one dying domiciled in England either under a will or an intestacy. In *Boyes v. Bedale* (1 H. and M. 798) Lord Hatherley held that the son of a man domiciled in France, who was born before the marriage of his parents, and legitimated by their subsequent marriage, could not succeed to personal estate under the description of child of his father in the will of an English testator. The Vice-Chancellor decided the case on the ground that it was a question of construction, and a legacy to a child of A must be taken to mean a child in the sense in which the law of England understands the term, or (in other words) one who would be the child of the person in question if that person had been domiciled in England. The Vice-Chancellor expressed an opinion that the language of the Statute of Distributions would be dealt with in the same manner. In *Goodman's Trusts* (14 Ch. D. 619) Sir George Jessel held that "children" in the Statute of Distribution does not include children who, though legitimate according to the law of their parents' domicile, are illegitimate according to English Law. The decision, like that of Lord Hatherley, related to an *ante-natus* legitimated by subsequent marriage of his parents, but the reasoning in both judgments would apply equally to the offspring of marriage with a deceased wife's sister. The broad ground taken was that the claimants in each case were not *ex justis nuptiis procreati*. Sir George Jessel's decision was overruled in the Court of Appeal (17 Ch. D. 266) by Lord Justices James and Cotton, Lord Justice Lush dissenting, and there have been subsequent decisions, such as that by Mr. Justice Kay, in *In re Andros* (24 Ch. D. 637), and by Mr. Justice Stirling and the Court of Appeal in *In re Grove* (40 Ch. D. 216). The question may now, therefore, be considered as settled. The decisions of Lord Hatherley and Sir George Jessel appear to the present writer to have been entirely contrary to the accepted principles of private International Law and clearly erroneous. Admitting that the question was one of construction of the words "child" or "children," the answer should have been that the English Law recognises as the legitimate child of a person one who has acquired that status according to the law of his parent's domicile. To require that he should also fulfil the conditions which would be required if his parent were domiciled in England, has no foundation either in legal principle or common sense.

Succession to Real Estate.—With regard to real estate the case is different. Ever since *Birtwhistle v. Vardill* (7 Cl. & F. 895) it must be taken to be the law of England that, in order to establish a title to real estate by descent, the claimant must predicate of himself that he is the legitimate issue of a marriage which would have been valid if made between domiciled Englishmen. As Chief Justice Tindal said, this rule of descent is a rule of positive law annexed to the land itself, and must prevail even if it be at variance with the ordinary rule of International Law. The late Lord Esher expressed a doubt whether the rule applied to the child of a marriage with

a deceased wife's sister, when such a marriage was lawful by the law of the domicile. But, in the opinion of the writer, there is no room for such a doubt. The principle on which the descent of a legitimated *ante-natus* was declared contrary to English Law would equally apply to the issue of a marriage between persons who by English Law were incapable of marrying, and it is impossible to read the judgments in the House of Lords in the Scotch case of *Fenton v. Livingstone* (3 Macq. 467) without seeing what the decision in a similar case in England would be. But this rule only applies to descent, and it does not follow that if real estate be given to one by will or deed, as child of A, the person who had the status of a legitimate child of A might not take. That question was answered in favour of the claimant by Mr. Justice Stirling in *Grey's Trusts* (1892, 3 Ch. 88), which again was a case of an *ante-natus* legitimated by subsequent marriage. The writer thinks the decision right, and one that would be followed. The same principle would of course apply to the children of the marriages under discussion. If this be the correct view of the law, the son of one of these marriages might succeed under a will or settlement as tenant in tail by purchase by the description of son of his father, but could not succeed as heir in tail by descent from his father if the latter were the purchaser (in the legal sense) or proprietor.

Anomalousness of the Present Law.—The question may well occur to many minds whether it is worth while maintaining these fine distinctions, and whether any object whatever is gained by doing so? The people who are affected by this state of the law are, it must be remembered, our own sons, daughters, brothers, sisters, nephews and nieces. It is not an uncommon case for a younger son of a great family to emigrate, and by unexpected deaths without issue, find himself entitled to the family honours and estate. If he has contracted one of these marriages he cannot transmit them to his son. Or, if he is dead when the succession would have opened to him his son cannot succeed in his place. Again, a returned colonist buys an estate "at home"—and dies suddenly without having made his will—as any man may. A collateral relation steps into the estate in exclusion of his children. On the other hand, leaseholds of whatever length of term are personal estate, and may be taken by the children. A humorous illustration of the anomalies of the law was given in the course of the debate on second reading. A man, it was said, may have a leasehold house for a long term and a freehold stable adjoining. His son is legitimate in the house and a bastard in the stable. What is the object, one repeats, of maintaining such anomalies in the law? Who is benefited by their maintenance, or who will be injured by their repeal? You may be opposed to marriages with a deceased wife's sister, but if the colonists are entrusted with plenary powers of legislation, that is for them to decide. There was considerable force in the Lord Chancellor's suggestion, that the Bill was really one to alter the law of inheritance in this country. Maybe it would

204 STATUS IN CONNECTION WITH COLONIAL MARRIAGES.

be more logical and better to pass a law of general application for that purpose, but in the meantime, and until the Government of this country think fit to do so, one does not see why the colonists should not sue for the remedy of their particular grievance because it is part of a larger general question. The grievance is none the less real because to a large extent it may be sentimental.

DISCIPLINARY JURISDICTION OVER SOLICITORS.

[*Contributed by* HENRY EDWARD GRIBBLE, ESQ.]

Influential Position of the Solicitor.—Both the status of solicitors and the influence incident to their practice make expedient a special disciplinary jurisdiction over the members of the profession. They are, as representing the old order of attorneys, officers of the High Court of Justice, and the only persons entrusted with the duty and privilege of appearing for suitors in that Court and in the subordinate Courts of Justice, civil and criminal, throughout the country; while the voluminous and intricate provisions of Common and Statute Law, bearing upon almost every transaction of magnitude affecting the rights of person or property in this densely populated and wealthy community, necessitate constant reference to their experience and knowledge, and give them a unique, an almost unrivalled, influence. That this influence is as a rule exercised by solicitors for the sole good of their clients, is due mainly to the very high feeling of professional honour which prevails among them; but it is watched, and properly watched, by the State with a certain jealousy. Hence their capability and qualification for acting as solicitors is rigidly tested, the conditions of their practice are carefully regulated, and their right to practise the profession is revoked on any deflection from the strictest course of integrity.

Different Kinds of Control: Law Societies and the High Court.—From very early times this discipline has been exercised in a twofold manner: first by the Courts of Law, and, secondly, by voluntary associations among solicitors themselves, much on the lines of the old City Companies.

The power of these associations is, in the present day at all events, moral and social; the penal power rests entirely with the Courts of Law. But the two are much mixed up. For instance, the Courts admit solicitors to the roll, which gives them the right of practising their profession; but as a preliminary they require the qualifications of candidates to be tested by examinations conducted by the Incorporated Law Society. After admission, an annual certificate must be taken out, which is as a rule granted as a matter of course, but may, under certain circumstances, be refused; the Society, as the registrar of the roll, considers such

circumstances, and may decline to issue a certificate, when the solicitor (for, being on the roll, he is still a solicitor, although he may not practise his profession without a certificate) may appeal to the Master of the Rolls, who decides whether the certificate may issue. Orders regulating the charges of solicitors for conveyancing work are settled from time to time by certain of the Judges, but in combination with the President of the Society and the President of a country Law Society; and, lastly, complaints against solicitors are dealt with by the High Court; but the application of the complainant may be, and as a matter of practice invariably is, addressed to the Society, and examined into and reported on by a committee of the Council of the Society.

Thus the High Court is the only body possessing actual jurisdiction over solicitors. Voluntary associations, as the Incorporated or other Law Societies, can express opinions and admonish members, or remove them from membership, but cannot deprive them of their right to practise their profession.

The power of the Law Societies is salutary, and tends strongly to preserve the high tone which animates the profession, but the final sentence on evil-doers is most properly reserved for a Court of Justice, as the only body which should be entrusted with the power of depriving a man of the means of earning his livelihood and of depriving his *clientèle* of his services. I call attention to this particularly, because a superficial knowledge of the position causes some persons to throw on the Law Societies a burden of responsibility in regard to evil-doers for which there is no real foundation.

Division of Subject.—I propose to refer to attorneys as officers of the Law Courts, next to trace the origin and present conditions and functions of the Law Society, and, lastly, to allude to the causes which conduce mainly to such complaints as usually arise against a few of my brother-practitioners, and especially to the recent unhappy scandals.

Solicitors as Officers of the Court.—The first Statute regarding attorneys was passed in the year 20 Henry III., when it was provided that any person who was a suitor might appoint an attorney to conduct his case. Those attorneys became officers of the Court in which they appeared. From that time Statutes have been continually passed regulating the right to practise or confirm the admission of attorneys, and for regulating their practice and conduct throughout their career. The name "solicitors" was originally applied to those who superintended the general business affairs of their clients, but attorneys who won their clients' confidence by the conduct of their litigation rapidly acquired their confidence also in other matters, and were consulted in dealings with property of all kinds, and became known by both names; in fact, even at the present day there is no better introduction to good business than to establish a reputation for the successful conduct of litigation.

Gradually the more modern term of "solicitor" supplanted that of

"attorney" until, by the Judicature Act of 1873, the latter term was superseded. The profession appears to have been open to any competent person until the Act 4 Henry IV., chap. 18, which recites that "sundry damages had ensued to persons by the great number of attorneys ignorant of the law, and not learned as they were wont to be," and provides that attorneys should be examined by the Judge, and that they that were good and virtuous, and of good fame, might be received and sworn to serve well and truly in their office, and their names placed on the roll. This is the first record of any examination, and it appears to have dealt rather with the moral than the legal training of applicants. Certain functions have at different times been given to bodies of solicitors by which some amount of control has been either voluntarily or by Statute exercised over them, and these will be dealt with later; but it must be borne in mind that the Courts, and the Courts only, are the tribunals which have the right of giving admission to the roll, and of allowing members to continue on the roll. In regard to their practice, the Courts have always assumed the right of regulating their charges. The earliest Statute regulating these is the Statute 3 James I., chap. 7. And, *à propos* of this subject, while it is conceded that some regulations are necessary, a system which puts the experienced solicitor on a par with the most youthful is ludicrous. If Lord Davey had been during his last years at the Bar entitled to receive no higher fees than the white-wigged novice just called, the absurdity would not be greater than it is in our profession, where a solicitor of recent admission is entitled to and obtains the same fees as the most experienced practitioner. Of course the matter rights itself by the client paying additional charges proportionate to the importance of his case and the skill employed; and the impossibility of framing any scale applicable to all cases is one of the causes of the difference often talked of between party and party and solicitor and client costs.

Jurisdiction of the Court over its Officers.—The jurisdiction of the Court in regulating the conduct of its officers may of course be exercised at any time, and includes the right of settling the scale of fees to be taken in litigious matters and framing regulations for carrying on litigation; but the most important exercise of this jurisdiction is the regulating of the roll by striking off or suspending such solicitors as misconduct themselves. The details of this operation are dealt with below. It is sufficient to say here that, while I have never heard of undue severity being attributed to the Court, there have frequently been cases in which an unexplained leniency is shown. That a piece of unprofessional conduct on the part of a young solicitor, occasioned by excess of zeal for his client, is sometimes sufficiently dealt with by strictures passed on him by eminent Judges is obvious; but the profession have sometimes noted with regret that men abusing their situation and guilty of dishonest or dishonourable acts, perpetrated for their own benefit, have been allowed to remain on the rolls,

and merely suspended from practice for a time. Such cases are rare, but do occur, and can be attributed only to some wave of leniency, the origin of which is not shown in the reports of the cases.

The Incorporated Law Society.—The detail working of this penal discipline is entrusted to the Incorporated Law Society, which is an association incorporated in 1831, and including in its members now about fifty per cent. of the profession. Its original object does not appear to have been in any way connected with functions of discipline; but besides the statutory powers entrusted to it, the influence of such a body—to which practically all the most eminent metropolitan and a very large number of country practitioners belong—is of course very extensive. Its influence is extended beyond its members by the country Law Societies formed in most counties and in all large business centres, and working with the main Society.

Early Efforts at Association: The Inns of Chancery.—From very early times endeavours were made to associate solicitors and attorneys in bodies which would exercise some control over them, and give a certain amount of coherence to the profession. In the seventeenth century this object was sought to be attained by providing that solicitors should be members of one of the Inns of Court, and probably in earlier times the Inns of Chancery (of which Staple Inn, Furnival's Inn, and New Inn survived to our time) were composed entirely of attorneys. The prime object of these Inns was apparently education, but they no doubt exercised some control over their members. I am not aware in what way the practice fell out of use; probably the spread of communication and business all over the country rendered the Societies mere private unions of individual members of the profession. At all events, about the beginning of this century the control had entirely ceased, and it was probably owing to this that a Society known as "The Society of Practisers in the Civil Courts of Law and Equity" was established "for the promotion of fair and honourable practice, and the detection and discountenance of all unfair practices." The objects of this Society were almost identical with those of the well-known Companies of the City of London. This Society lasted until the beginning of this century, when it was apparently in active operation; but in the year 1816 it appears to have ceased to exist, for what reason is not known. Probably some of the members of this institution, certainly one of them, regretted its disappearance, as they took an active part in promoting the present Incorporated Law Society.

Formation of the Incorporated Law Society.—It is beside the purpose of this paper to give a history of that Society; but the work which it has performed, both for the profession at large and for the general public, has well entitled it to the confidence, not only of the Judges, who are generally acquainted with the leading members individually, but also of the Legislature, which has entrusted to it many responsible and onerous duties. But it

must be borne in mind that it is a voluntary association, with no power to compel membership on any solicitor, and only a moral power of enforcing discipline, any member who may be censured by the governing body, or who may apprehend that he is about to be censured by them, being at full liberty to withdraw from membership.

Its Functions: Examination of Candidates.—The first function of the Society in connection with discipline is the conduct of the examination of candidates for admission to the rolls. These examinations the Society conducts under various statutory powers, subject always to the right of appeal of any candidate from the verdict of the examiners to the decision of the Master of the Rolls—a right of appeal which has been exercised twice during the last ten years; and as during that period there have been admitted some thousands of solicitors, it may be assumed that the examinations are conducted in a manner satisfactory both to the authorities and the candidates. In no instance has the decision of the Society been reversed. The examinations consist, first, of a preliminary examination, which must be passed by every candidate before being articulated, unless he has passed some one of several specified examinations or has taken a degree or been called to the Bar. The standard is about that for passing the Matriculation Examination for London University, and is a fair educational standard for a young man of seventeen. Any higher standard would unduly close the ranks of the profession.

The candidate has also to pass, during his articles, an intermediate examination in some set book or books (the book in use for many years has been Stephen's *Commentaries on the Laws of England*, as providing a complete survey of the whole of English Law), and finally, before admission, an examination in the whole subject of Law itself—Conveyancing, Equity, Common Law, Bankruptcy, Probate and Divorce, Admiralty, and Criminal Law. The standard is a fairly high one, and the examinations as conducted are admittedly superior in their extent and thoroughness to the examinations conducted by the Inns of Court for barristers. Having passed this examination, the candidate must satisfy the Society that he has conducted himself properly while under articles, and he is then, after signing a declaration similar to the oath originally required from attorneys by Statute 4 Henry IV., admitted as a solicitor on the rolls. The right of appeal to the Master of the Rolls extends to all the examinations and to the question of conduct.

As before observed, the solicitor, before actually practising, must take out and every year renew a certificate, upon which an annual duty is charged. The Society, as registrar, has the issuing of these certificates, which can be refused only on such grounds as that they have not been renewed each year, or that the applicant has become bankrupt, or the like. Appeal lies from the registrar to the Master of the Rolls.

Investigation of Complaints—The Statutory Committee.—Under the

Solicitors Act, 1888, the Society is further entrusted with the duty of inquiring into the complaints preferred against solicitors. The Master of the Rolls appoints a Committee of not less than three nor more than seven of the members of the Council of the Society to hear any application to strike a solicitor off the rolls, or to require a solicitor to answer allegations contained in an affidavit. The Master of the Rolls may also remove any member of the Committee or fill any vacancy. This Committee is a Statutory Committee, and quite independent of the Society or the Council. The applications are made to and heard by the Committee, who, after hearing the case, embody their finding in the form of a report to the High Court. If they are of opinion that there is no *prima facie* case, the Society takes no further proceedings; but if the Committee are of opinion that there is a *prima facie* case, the Society brings the report of the Committee before the Court. The Committee administer and take oaths and affirmations for the purpose of the inquiry, and provisions are made for making rules under this Act. The Court alone acquits or condemns and sentences the reported solicitor.

Merits of the Committee as a Tribunal.—It is impossible to speak too highly of the method in which this Act has been carried out. This is the opinion of almost every one who has conducted business before the Committee, and in which, from considerable experience, I can concur. There have recently been two attempts to impugn this tribunal in the public press; but on ascertaining the real facts from the papers in the cases referred to, it appears that these facts were not fully and accurately stated, and the true circumstances fully exonerated the tribunal from the accusation of leniency brought against it, and which was unfounded. The members of the Committee, although fulfilling an important public duty, are unpaid. The Government pass annually a vote of £2,500 towards the expenses the Society is put to in carrying out this Act, and this does not at all cover such expense. In consequence of the accusation above referred to, Mr. T. G. Bowles gave notice this year of a motion to oppose this grant. Unfortunately he did not bring the motion on.

Testimony of Mr. Justice Cozens-Hardy.—The following letter was written by Mr. Justice Cozens-Hardy for the use of Sir Henry Fowler (the present Vice-President of the Society) in answering such motion, and his lordship has kindly sanctioned my publishing it. Mr. Addison, to whom it is addressed, is a former President of the Society.

50, LADBROKE GROVE, W.,
June 15, 1900.

DEAR MR. ADDISON,—I have no hesitation in saying that I consider the Statutory Committee of the Incorporated Law Society an excellent tribunal to deal with the questions which you brought before it, and to report thereon to the Court. Some years ago I appeared as counsel before the Committee in a very heavy case, which lasted several days. I was greatly impressed with the care and skill displayed

by the three members of the Committee in dealing with the complicated details of business transactions. The report was so clear and so well reasoned that I found it a hopeless task to defend my client when it came before the Lord Chief Justice and Mr. Justice Lawrance. I do not believe any other preliminary inquiry would have been as satisfactory.

I may add that I saw no indication of a desire to screen a brother solicitor.

Only once since I have been a Judge have I had occasion to send to your Society papers involving a solicitor in what, unless explained, looked like gross professional misconduct. I have reason to believe that the matter was at once investigated, and that it would have been dealt with by your Committee, had not criminal proceedings been commenced, which resulted in a conviction.

I am, yours faithfully,

(Signed) HERBERT H. COZENS-HARDY.

J. ADDISON, ESQ.

You may show this letter to Sir Henry Fowler if you think fit; but I must not be considered to have expressed any opinion upon the burning question whether your Society ought to prosecute fraudulent solicitors.

I have shown the above paragraph to the following eminent counsel, who have authorised me to state that their experience of the tribunal concurs with that of Mr. Justice Cozens-Hardy:—Right Hon. H. H. Asquith, Q.C., M.P.; Mr. R. M. Bray, Q.C.; Mr. Lawson Walton, Q.C.; Mr. Boydell Houghton.

Recent Scandals—The Solicitor's Temptations.—The above is an account of the machinery for administering the discipline of the profession, but it is impossible, after the failures which have occurred and the recent correspondence in the press, to avoid dealing with some of the principal causes for scandal which have arisen. In a profession containing seventeen thousand members there must be not only dishonest men, but also weak men. The possession of a practically unlimited and uncontrolled power over large sums of money constitutes a temptation to which both solicitors carrying on family business and bankers are equally exposed—a temptation to deal with such funds by investing them, imprudently in the case of the banker, and, in the case of solicitors, in a manner not authorised by the terms of the trust and in accordance with his duty. The result may be in both cases an irreparable loss, and yet the acts which have brought it about may be acts done with a perfectly honest mind. The banker has this great check upon him—that he is liable to be called upon to replace the capital at any time. The solicitor has not. In most cases, so long as the interest is duly provided, the clients of the solicitor rest contented in the belief that the security is a proper and sufficient one. The temptation, therefore, to a weak-minded man who has in all good faith advised what he believes a good investment for his client is strong, instead of admitting his mistake and facing the possible loss of a valuable connection, to provide the interest himself, and he may for years continue to do this, still in the hope that his original estimate was correct—that the property would improve and the capital be recovered.

Once started on this course, the deceit he is practising will blunt his sense of honesty. He probably uses other money to bolster up the old security, and goes deeper and deeper; he increases his expenses—partly, probably, from recklessness, partly from desire to present an appearance of prosperity—while his professional income is cut into by the interest he has to find, and so the end comes.

A Diagnosis—The Virtue of a Balance-Sheet.—Now, two things strike us in every one of these cases. So far as I know (i.) a defaulting solicitor has never made a purse for himself, but is always in a state of absolute impecuniosity; and (ii.) his books have never been balanced, nor his accounts regularly and honestly made up; the inference from which is that the dishonesty is not of set purpose, and that had he been compelled to look his situation full in the face, he would not have gone on when once he saw himself on the wrong side. The proper keeping of his books and the making up of an honest annual balance-sheet would have saved many a man from going from bad to worse.

For the man who deceives his client by pretending to invest on a sound security money which he deliberately puts on what he knows is a bad one, or who, receiving money to be paid to his client, appropriates it to his own purposes, nothing can be said or done. Such scoundrels exist, but a percentage of one per thousand probably exceeds their actual ratio to the honest practitioner. Dartmoor or Portland would be their destination whatever business or profession they entered. To endeavour, therefore, by all means to ensure the regular keeping of books and making up of a balance-sheet is an enterprise well worthy of the efforts of every one interested in the honour of our profession. Anything like compulsion is in this respect out of the question, as, having regard to the extraordinary variations in the nature of the practice, it would be difficult, if not impossible, to enforce, nor could the Incorporated Law Society make it a condition of membership without a change in their constitution which might produce serious results on their present numbers and in their efficiency for good.

Encouragement of Account Keeping by Solicitors.—The only suggestion I have seen which could effect the desired object is the formation of an association of solicitors on the lines of the provincial Law Societies, with the object of encouraging the keeping of accounts and the making up of annual balance-sheets. Such an association could only be formed if taken up by a great number of first-class firms, and must be subject and affiliated to the Law Society. Admission would be limited to members of that Society, and each member would have bound himself to submit his accounts and balance-sheet to the governing body whenever called on.

This last suggestion is the one sole and efficient safeguard. To compel the preparation of a balance-sheet annually by an accountant would be impossible and unavailing. The accountant would not know anything of the value of the securities, and no solicitor would submit to have them

inspected so frequently as once a year, but an accountant sent in occasionally for the purpose would be bound to make some enquiries as to the securities which have been selected. It would be invidious to call upon a member to submit his books, but a percentage of the members might be selected by ballot each year as subjects for such investigation.

No doubt this scheme is crude, and it may very possibly not meet with the approval of firms conscious of their business being well and properly conducted, and cognisant of the small proportion which the number of solicitors failing bears to the numbers of the profession, and also of the infinitesimal proportion which the amount lost bears to the amounts with which the profession deals.

Conclusion.—In every profession there are black sheep—unworthy members. It is a matter of just pride to us solicitors that there are so few of such members to be found in our ranks—that the honourable, high-minded solicitor is the rule to an extent not less than, but probably far exceeding, the like class in other professions. The concurrence of several regrettable cases of frauds or failures by solicitors has given an undue prominence to the professional malpractices of a few, and so may have created a false impression in the public mind as to the credit and honour of the profession.

One thing must not be forgotten—the profession of the lawyer has always been, and always will be, an unpopular one. Perhaps it is that the lawyer knows too much of every one's affairs to be regarded with favour by those who have secrets, pecuniary or personal, of which they grudge the knowledge; but whatever the origin of the prejudice, the result is that any cry raised against the profession is made the most of by the press, and widely circulated, grossly exaggerated, and over-coloured. But this is a traditional antipathy, not a personal feeling. The confidence shown in the individual adviser, and the knowledge so continually made evident that the client knows his interests to be as safe in the hands of his solicitor as, and probably safer than, in his own—a confidence and knowledge well founded in ninety-nine out of every hundred cases—shows that the discipline I have endeavoured to describe has not been without its effect, and has produced a class of men of which we are proud to form the constituent parts.

THE SUPPORT OF WAR BY WAR.

[Contributed by J. S. RISLEY, ESQ.]

Sea Warfare Rules: Superior Certainty.—Rules of war in some rudimentary form have existed from very early times, but whereas the rules regulating the conduct of sea warfare have been constantly increasing in certainty and authority since the genesis of modern International Law in the seventeenth century, the conduct of land warfare has, until recent times, been left to the varying and inconsistent usage of belligerents in the field and the platonic prescriptions of learned publicists. This difference in the development of the two branches of the Law of War has been due partly to the existence of early maritime codes of recognised authority, such as the *Consolato del Mare*, in which the new-born International Law found the basis of a sea law ready to hand, and partly to the creation of naval prize-courts, which have given birth to a mass of authoritative case law and enabled neutrals to interpose as interested parties and co-operate in settling doubtful questions and building up the law.

It was the corresponding inability of neutrals to interpose during the course of hostilities which, to a large extent, formerly caused the rules and usages as to land warfare laid down, or at least advocated, by the publicists to be so vague and contradictory; whilst at the end of every war the settlement was necessarily a political one; and even where neutral Powers assisted in such settlements the primary importance of letting bygones be bygones and diminishing future bitterness rendered it inadvisable to review or pass judgment upon any acts of war the legality of which had been called in question, even in the case of acts whereby neutral interests had been prejudiced. But to this immunity from neutral interference must be added the entirely different character of the hostilities waged by land and sea. The circumstances of no two land campaigns are alike; the various contingencies that arise in the invasion of an enemy's country are so complex and diverse that the conduct of other belligerents in previous wars may well form precedents difficult or impossible to follow, and Selden's well-known sneer about equity and the Chancellor's foot might justly have been applied to the rules of land warfare and commanders in the field a hundred years ago.

Tendency to Settlement of Land Warfare Rules.—Since then a great development has taken place, due partly to the efforts of philanthropists and publicists, partly, no doubt, to the inherent interest of the subject and a variety of other causes which have combined to stimulate individual and concerted action on the part of the Powers. The official or semi-official manuals which individual governments now issue for the instruction of their armies in the field are of value as expressing the views held by them on debated points, and help to smooth the way for the codification of the law of land warfare at international conferences. Moreover, the railway and telegraph have brought governments into closer touch, and have made it easy and desirable to hold such conferences in time of peace for the purpose of settling rules which the passions excited by a war cannot possibly permit to be fairly discussed during its continuance or even at its immediate close. The first of these conferences was, if judged by its results, the most successful. It met on the invitation of the Federal Council of Switzerland at Geneva in August, 1864, and passed the famous Convention, which is probably the only piece of international legislation which has been universally accepted as of unquestionable authority. Other conferences succeeded. At Geneva in 1868 additional articles were framed at a second conference, but though signed by most of the signatories of the original Convention, they have never been formally ratified. A conference at St. Petersburg, also in 1868, made a declaration as to explosive projectiles which is binding upon its signatories. More recently there have been the important Conferences of Brussels and of the Hague.

Although neither the "Declaration" nor the "Convention," drafted respectively at the Brussels Conference in 1874 and the Peace Conference at the Hague in 1899, has the binding force, as it were, of an International Act of Parliament (which may fairly be said to be the character of the Geneva Convention), they are much more than pious expressions of opinion, and possess an authority which cannot be disregarded in present practice or in future attempts to arrive at a final settlement of the rules of war with which they deal. Nor is the single opinion of any publicist, living or dead, however eminent, sufficiently weighty to be adduced against the conclusions of these two conferences as to the rules which should regulate modern land warfare.

"Væ Victis."—Of first-class importance amongst the latter appear to be the rules determining the means by which war can be made to support war. It may be taken as a general principle of the Law of War that the stronger belligerent has the right to make the weaker pay his expenses, but humanity and "utility" alike demand that the extent of this right should not be measured merely by the stronger belligerent's might, and prescribe the definition of legal limits to its exercise. What, then, are those limits? These, like most other rules of land warfare, are not to be laid down in detail with absolute certainty and preciseness; but usage in modern warfare

and the trend of modern opinion as collected at Brussels and the Hague make it possible to outline in general terms the course of action permissible to the stronger of the two belligerents on invading the enemy's country.

At first he possesses the character of a mere invader, whose position is or may be a hazardous one, and his rights consequently extend solely over enemy persons and property actually within his reach. As his hold upon the country tightens, his invasion may be consolidated into complete military occupation, and his claim upon its resources enormously increases. Nothing succeeds like success. Finally, should military occupation ripen into conquest, the country passes entirely into his hands, and he can make it pay any proportion of the expenses of the war remaining unpaid which he may consider desirable. This, however, is merely a matter of administration, not of law, a measure of peace, not of war, and does not, therefore, come within the scope of this article.

Rousseau's Fiction: War a Relation of States.—When one belligerent invades the territory of another he is not at first brought into contact with the enemy State, but only with its armies and the civil population on his line of march. In considering the relation of the latter to the war, reference must be made to the amiable but absurd theory of Rousseau, that war is a relation of States alone, and an individual is a stranger to it, both in person and property, except when he is actually fighting or contributing to the prosecution of hostilities. This doctrine was wholly unknown to Grotius, Puffendorf, Bynkershoek, and the other early publicists, and the only reason that any importance has ever been attached to it is that it was adopted by M. Portalis in opening the French Prize Court in 1801. He laid it down as follows: "La guerre n'est point une relation d'homme à homme, mais une relation d'état à état, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats; non point comme membres de la patrie, mais comme ses défenseurs." The doctrine is in every way an objectionable fiction. As a matter of theory, a State apart from the individuals who comprise it is an abstraction to which force cannot be applied. The adoption of such a theory would render war practically impossible. And, as a matter of fact, the doctrine is wholly unsupported by practice, the usages of modern warfare, from the beginning of the last century down to the present day, having been absolutely at variance with it. The doctrine has always been repudiated by Great Britain and the United States and the smaller Continental Powers, as its adoption would negative the right of resistance by the civil population against invasion, and render a *levée en masse* illegal and impossible. It was this particular question which brought the Brussels Conference to a deadlock. Under Article 10 of the draft Declaration the inhabitants of territory *not yet occupied* by the enemy may, on the enemy's approach, make a *levée en masse*, and are lawful combatants if they respect the usages of war. This article, coupled with

the first eight articles, which deal with the military authority of an invader over the hostile territory *actually* occupied by him, would render a *levée en masse* unlawful when once occupation has been effected. On the ground that this would place a premium on the treacherous invasion of weak States by strong, the Declaration was resisted by the smaller military Powers, and the Conference broke up without giving binding force to its draft Declaration, which was signed by the delegates "merely as submitting the record of the proceedings, and not as pledging their governments in any manner." The Brussels Articles 9-11, dealing with the character of lawful belligerents, were substantially repeated in Articles 1-3 of the second Convention (as to land warfare) framed by the Hague Conference, 1899, Article 2 permitting a *levée en masse* in non-occupied territory. Between the Brussels Declaration and the Hague Convention there is, however, this important difference, that the latter is of far higher authority, its signatory Powers binding themselves to issue instructions to all their land forces in conformity with its articles. It is submitted that neither in the Brussels Declaration nor in the Hague Convention nor in any other part of International Law or practice has there been anything to divest the civil population of an invaded country of their enemy character. They are not spectators standing aloof, but enemies, and liable to be treated as such both in person and property. Their personal treatment of course depends upon their conduct, and if they commit hostile acts they forfeit their non-combatant character and the immunity from violence which attaches to it.

It is not, however, with the personal conduct and safety of the civil population that we are immediately concerned, but with the invader's rights over their property, and also over the public property of the State.

Invader's Rights over Enemy Property.—In ancient times, wherever enemy property was accessible, it was liable to seizure (*res hostiles, res nullius*), but the usages of modern warfare have considerably modified and restricted this rule. Certain kinds of public enemy property become immediately accessible to the invader. He can, for example, seize and use for military purposes the public lands and buildings of the towns which surrender to him. The conversion of a town-hall into a hospital means the saving of the labour and expense of extending hospital accommodation at his base, and to that extent it is a contribution exacted from the enemy towards the expenses of his own defeat. All the movable public property of the State which can assist the operations of the war can be seized by the invader without any indemnity, and the capture of military stores, transport, and all kinds of warlike material makes an important addition to the credit side of an invader's war account. The property, whether public or private, taken from the enemy on the field of battle, in the operations of a siege, or in the storming of a place which refuses to capitulate, is usually regarded as "booty," or the legitimate spoil

of war, which vests in the capturing State, but is commonly divided amongst the captors upon principles laid down by each State's own municipal law. Booty, consequently, is not one of the means by which war may be made immediately to support war. Private movable property has always been at the mercy of the invader and liable to pillage or destruction; and this includes neutral property, which acquires an enemy character merely by being permanently situated in the enemy's country, whether its owner is domiciled there or not. It is, therefore, subject to all the consequences of lawful hostilities, just as enemy property is. But though the invader has a right to pillage or destroy, he usually spares private property for his own advantage, and it has been customary since the Thirty Years' War to allow the inhabitants to buy off pillage by the payment of a ransom to the invader, or by furnishing him with fixed amounts of provisions or other things requisite for his campaign. This custom has developed into the practice of levying contributions and requisitions from the inhabitants; and subject to their paying the former and supplying the latter, and committing no acts of hostility against the invader or violating the laws of war, their private property is now safe, except in cases of urgent military necessity, which may, for example, require the razing of houses to the ground or the destruction of crops.

Requisitions and Contributions.—Such being the origin of requisitions there can be no doubt that an invading army has the right to exact them from the inhabitants *without paying for them*, and also to require contributions for its support. In practice, requisitions consist in the supply of food or transport or articles of immediate use for the troops, or personal service, such as acting as a guide, blacksmith, or driver in the army, and may be exacted by the commander of any detached body of troops, either with or without payment. Contributions are payments of money either in lieu of or in excess of the ordinary taxes. The *Instructions for the Government of the Armies of the United States in the Field*, issued in 1863, maintain "the right of a victorious invader to tax the people or their property, to levy forced loans, or billet soldiers, or to appropriate property, especially houses, lands, boats or ships, and churches for temporary and military uses" (Art. 37). Article 38 of the same instructions provides: "Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity for the support or other benefit of the army or of the United States. If the owner has not fled, the commanding officer will cause receipts to be given which may serve the spoliated owner to obtain indemnity." Article 39 of the draft Declaration of the Brussels Conference provides that pillage is expressly forbidden. Article 40 is as follows: "As private property should be respected, the enemy will demand from parishes, or communes, or the inhabitants, only such payments and services as are connected with the necessities of war, generally acknowledged in proportion to the resources of the country, and which do not imply with regard to the inhabitants the

obligation of taking part in the operations of war against their own country." By Article 41 contributions can be levied only by the commander-in-chief, and for every contribution a receipt must be given to the person furnishing it. Article 42 provides: "Requisitions shall be made only by the authority of the commandant of the locality occupied. For every requisition an indemnity shall be granted or a receipt given." The discussion at the Conference, however, clearly showed that such receipts do not imply any recognition of indebtedness on the part of the invader, and payment for them can only be arranged for at the end of the war, when, if the invader does not agree to pay, the Government of the occupied country may, if it sees fit, reimburse its subjects who have supplied requisitions to the enemy. The *bons de réquisition*, or receipts given by the invader, facilitate such a course, though their primary object is to protect holders from having to supply an unreasonable quantity of requisitions during the invasion. The invader's freedom from liability on such receipts is confirmed by the French *Manuel de Droit International à l'Usage des Officiers de l'Armée de Terre* of 1884 (p. 126) and by the American Instructions of 1863 already quoted, which merely suggest that such receipts "may serve the spoliated owner to obtain indemnity" (Art. 38).

It is clear, therefore, that an invader can, if he likes, make the invaded country contribute substantially to the support of his army by means of contributions and requisitions for which he does not pay at the time, and only gives receipts by which he incurs no liability for future payment. But although forced requisitions are permissible, they are objectionable where they can be avoided, as even when paid for on the spot, they are calculated to irritate the inhabitants and cause them to withhold or even destroy supplies, thus ultimately making the maintenance of an army a matter of increased difficulty. Consequently, as a matter of policy, it may be the better course to substitute a voluntary market for compulsory requisitions, and to invite the inhabitants to bring in supplies, and pay a fair price for them in ready money.

Wellington and Napoleon: the Franco-Prussian War.—The Duke of Wellington was averse to requisitions both in the Peninsula and France. After Waterloo, however, his army received their provisions and forage by requisition in the country; but in every case upon regular receipts by the commissioners attached to his troops, not with the view of paying for what had been received, but in order to avoid abuse and plunder and to restrict the requisitions to food and forage only. Napoleon levied enormous contributions and requisitions in his campaigns. In 1806, after the battle of Jena, he made Prussia pay upwards of £4,000,000, and after Suchet's conquest of Valencia in 1812 the district was forced to pay an additional 200,000,000 francs for the use of the army. But the exaction of contributions and requisitions in the Franco-Prussian war was probably the most ruthless that has yet been seen in civilised warfare, and no doubt

largely contributed to the hatred and bitterness produced by the war. On entering French towns and villages the Germans billeted their troops on the inhabitants, chalking up on the door of each house the number of soldiers to be provided for therein, and requisitions were addressed to the mayor for every imaginable thing: horseshoes, boots, clothes, provisions, wine, cigars, and even horses were frequently demanded. While in occupation of Versailles the Germans made daily requisition for 120,000 loaves of bread, 80,000 lb. of meat, 90,000 lb. of oats, 27,000 lb. of rice and other supplies upon a correspondingly enormous scale. At Chateaudun, after burning and pillaging the town, General Wittich demanded a war contribution of 200,000 francs, 1,500 blankets, 100 kilogrammes of salt, 100 kilogrammes of coffee, 400 litres of brandy, and 20,000 litres of hay. When the Germans under General von der Tann occupied Orleans, October 13, 1870, a contribution of 1,000,000 francs in specie was levied on the town through the mayor, which sum was subsequently reduced to 600,000 francs, and requisition was made for 600 cattle, 300,000 cigars, and all the horses in the town, the soldiers being at the same time billeted on the inhabitants. After the capitulation of Dijon, October 30, 1870, General Werder made the town pay £20,000 "caution money" for its good behaviour. No requisitions were made, but the German troops, 20,000 in number, were boarded and lodged and all necessities for the army provided by the inhabitants. These are only a few examples of the German methods of making war support war; and, it may be added, in an official declaration by the French Government to the National Assembly, made May 22, 1872, it was stated that besides direct and indirect taxes the German troops had requisitioned a sum of over 327,000,000 francs. The movable objects carried away without requisition were valued at over 264,000,000 francs, whilst parishes and individuals had been spoiled to the amount of 600,000,000 francs, declared and recognised.

Regulations of Hague Convention.—The Brussels Conference was the direct outcome of the excesses of the Franco-Prussian War, and the articles in its draft Declaration bearing upon the regulation of contributions and requisitions have already been quoted or referred to. It has been said that that Conference was held too soon after the close of a great war to be able to discuss the usages of land warfare dispassionately, or effect any settlement of vexed questions. The Hague Conference, convened at a time when the peace of Europe had not been broken by any serious upheaval for twenty years, had a larger prospect, and may be said to have achieved a larger measure of success. The third section of the second Convention of the Hague contains the following regulations as to contributions and requisitions:

Article 49.—If apart from the taxes referred to in the preceding article [the ordinary taxes of the country] the occupying Power levies other contributions in money in the occupied territory, it shall only be for the needs of the army or the administration of this territory.

Article 50.—No collective penalty, pecuniary or other, shall be proclaimed against the populations by reason of individual acts of which they could not be considered responsible in the mass.

Article 51.—No contribution shall be collected except in virtue of a written order and under the responsibility of a general-in-chief. The collection shall only be proceeded with as far as possible according to the rules of the assessment and apportionment of the taxes in force. For every contribution a receipt shall be delivered to the contributors.

Article 52.—Requisitions in kind and of services shall only be demanded of communes or of inhabitants for the needs of the army of occupation. They shall be in accordance with the resources of the country, and of such a nature as not to imply on the part of the populations the obligation to take part in the operations of the war against their country. These requisitions and these services shall only be demanded with the authorisation of the commandant in the occupied locality. Levies in kind shall, as far as possible, be paid for in cash; if not, they shall be certified by receipts.¹

The above form the latest instructions which the signatory Powers of the Hague Convention have bound themselves to give to their land forces as to the support of an invading army by contributions and requisitions.

"Occupation" of Enemy's Country: Effect of.—When, however, the invader has effectively occupied some portion of the enemy's country, his right to draw support from the latter, and his means of drawing it, are alike considerably enhanced. The first requisite of a military occupation is that it should be *effective*. On entering France in 1870, the Crown Prince of Prussia proclaimed that the establishment of a single post in any French canton would constitute a military occupation of the whole of that canton, the average area of a French canton being seventy-two square miles. If a territory could be "occupied" by such mere declaration or even by a small flying column, a *levée en masse* might always be prevented under Article 10 of the Brussels Declaration and Article 2 of the Hague second Convention. Accordingly, "a territory is considered occupied when it is placed actually under the authority of the enemy's army. The occupation only extends to those territories where that authority is established and in a position to be exercised" (Hague Art. 42, reaffirming Brussels Art. 1).

— **Not Sovereignty.**—Military occupation does not create sovereignty, but only a special temporary administrative authority; it does not confer absolute proprietary rights, but only certain rights of control and appropriation. The occupant administers the government of the occupied territory, secures public order, and generally discharges all the administrative and executive functions of the temporarily displaced Government under the ordinary laws of the country, which are only modified or suspended in case of necessity—*e.g.* by the proclamation of Martial Law. In short, in the occupant's hands the occupied territory has "a double debt to pay," the expense of its own

¹ *The Times*, August 1, 1899, and *Correspondence respecting the Peace Conference*, 1899 [C—9534].

administration and the expense of supporting the invading army, and for these purposes he has the following rights over public and private property in such territory.

Public Property.—With regard to public immovable property “the occupying State shall consider itself only as the administrator and usufructuary of public buildings, landed property, forests, and agricultural estates belonging to the hostile State, and situate in the occupied country. It shall be bound to safeguard the substance of these properties, and to administer them in conformity with the rules of usufruct” (Hague Art. 55, reaffirming Brussels Art. 7). Therefore the occupant can use public land and buildings, or let them, and appropriate the rents and profits. In countries where the State is a large landowner, as in the South African Republic, this source of revenue should contribute materially to the expenses of the occupation. With regard to public movable property, the Hague Convention substantially repeats Articles 5, 6, and 8 of the Brussels Declaration in the following terms :

Article 48.—If the occupying Power levies in the occupied territory the taxes, rights, and tolls established for the profit of the State, it shall do so as much as possible according to the rules of the assessment and apportionment in force, and on it therefore will also rest the obligation to provide for the expenses of the administration of the occupied territory to the same extent to which the legal government was bound in that respect.

Article 53.—The army which occupies a territory shall only seize the specie, the funds, and the realisable securities belonging to the State in its own right, the depôts of arms, means of transport, magazines, and victualling, and in general all movable property of the State of such a kind as to subserve the operations of war. The plant of railways, land telegraphs (including cables at the landing-points), telephones, steamships, and other vessels, apart from cases governed by Maritime Law, as well as depôts of arms, and in general every kind of munitions of war, even belonging to companies or private persons, are equally means of a kind to subserve the operations of war ; but they ought to be given back, and the indemnities for their use shall be adjusted at the conclusion of peace.

Article 54.—The plant of railways coming from neutral States which belongs to those States, or to companies or private persons, shall be sent back to them as soon as possible.

Warlike stores and materials, treasure, telegraphs, railway plant, and “all movable property of the State of such a kind as to subserve the operations of war” accordingly vest in the occupant ; and it is clear that the mere control of all the railway systems, whether State-owned or belonging to private companies, enables him both to occupy the territory effectively and to administer its resources so as to support that occupation.

Protection of State Archives.—Certain public property has by usage acquired a sanctity which renders it safe from seizure. The immunity of State archives and historical records, for example, has been recognised by most civilised countries in their military manuals, as also that of charitable,

educational, religious, and scientific institutions. "The property of local bodies, that of establishments devoted to worship, to charity, and to teaching, to the arts and sciences, even when belonging to the State, shall be treated as private property. Every intentional seizure, destruction, or degradation of establishments of this kind, of historic monuments, of works of art and science, is forbidden, and ought to be prosecuted" (Hague Art. 56, reaffirming Brussels Art. 8).

Private Property: Pillage.—With regard to private property, both the Brussels Declaration and the Hague Convention formally forbid pillage, and the modern usage is for a military occupant not to touch private property in the occupied territory without making compensation, except in certain specified cases. Thus, private property may be seized by way of penalty for military offences, and the occupying State has the same right as the mere invader of exacting contributions and requisitions from the inhabitants, with the power to exercise it over an infinitely wider area. It may be noted that the Hague articles dealing with contributions and requisitions, quoted above, only refer to an "occupying Power." But the greater includes the less, and the restrictions established by those articles naturally extend to an invader before occupation is regularly organised. This is, moreover, positively implied in the final paragraph of that portion of the definitive text of the report relating to the third section of the Hague Convention.

Effectiveness of "International Legislation."—If the stronger belligerent only avails himself of the extensive rights over his enemy's public and private property which the Hague Convention gives him as invader and military occupant, it is submitted that, without any illegal or questionable exercise of his might, such as a confiscation of debts due to the occupied State, he can make the latter contribute a large proportion of the expenses incident to the invasion and occupation of its territory. When military occupation develops, under treaty or by lapse of time, into definite conquest, the gain to the conqueror is rather in the nature of a war indemnity or prize of victory when the war is over. The exercise of the rights of invader or military occupant, on the other hand—rights gradually established by usage and recognised and affirmed by international conference—constitutes a means of making the war to some extent pay its way from day to day whilst hostilities are still going on.

THE WEST INDIES AND CONFEDERATION.

[Contributed by WALWYN P. B. SHEPHEARD, ESQ., M.A.]

"British Dependencies."—Provinces of the British Empire, insular or continental, near or remote, which are not represented in the British Parliament, but subject to distinct subordinate Governments, absolute or representative, are defined by Mr. Arthur Mills in his work on *Colonial Constitutions* as British dependencies. This definition is appropriate to the constitutional character of the relation between England and the several islands which are known as the British West Indies. These dependencies are also variously described by different writers as colonies, settlements, and possessions. Some of these islands were discovered by English navigators under the patents granted by the Crown for the discovery and occupation of lands uninhabited by Christian prince or people; whilst others became British possessions by conquest or cession from foreign sovereigns. In the former case grants from the Crown were obtained, and the settlements became at once subject to the English Common Law, and the settlers enjoyed all the constitutional rights and privileges of the people of England. But in the case of acquisition by conquest or cession the form of government was determined, and the laws were imposed by the Crown, subject only to the terms of the surrender or treaty of cession; hence the difference in administrative law between colonies acquired by settlement and those by conquest.

The constitutional relations between the subjects of the English Crown who have formed communities in distant territories and their sovereign are primarily based on that original, virtual, and implied allegiance owed by the subject to his sovereign antecedently to any express promise, oath, or engagement; in other words, on that natural allegiance which binds subjects born within the realm of England—*homagium ligeum*—the breach of which constitutes the crime of high treason. The early grants by the Crown of Colonial territory and jurisdiction contain the words of reservation, "*Salvâ semper fide et ligeantiâ ac dominio directo nobis hæredibus et successoribus nostris debitis,*" etc. In the patent of discovery and occupation granted by Henry VII. to John Cabot and his sons in 1496 the grantees were to occupy the discovered territories as vassals of the Crown, for whom the dominion, title, and jurisdiction were to be obtained.

Early Colonisation Charters.—A perusal of a few of these early Charters will afford evidence as to the constitutional principles upon which our Colonial empire was sought to be founded.

The Crown lawyers of the Elizabethan and Stuart periods appear to vary but little in their perception and enunciation of the relations to be established between the Crown and the people who left England to form communities in distant lands. In 1578 Queen Elizabeth by Royal Charter empowered Sir Humphrey Gilbert, of Compton, Devonshire, to discover and take possession of all remote and barbarous lands unoccupied by any Christian prince or people, and vested in him as grantee the propriety of the soils, reserving one-fifth of all gold and silver ore for the Crown, with power to dispose of the lands in fee simple or otherwise, according to the laws of England, to persons within the allegiance of the Crown, such lands to be holden by the grantees of the Crown, by homage and by payment of the said one-fifth part of all gold and silver ore, and on the grantee was conferred divers jurisdictions and royalties, with powers of government both executive and administrative, but subject to the proviso that all who should settle in the discovered lands should have and enjoy all the privileges of free denizens and natives of England, any law, custom, or usage to the contrary notwithstanding. In the subsequent patent of 1584 granted to Sir Walter Raleigh, the subjects who settled in the discovered territories were to have all the privileges of free denizens and natives of England within the royal allegiance in suchlike ample manner and form as if they were born personally and resident within the realm of England, any law, custom, or usage to the contrary notwithstanding. It is to be noted that in both these patents of Queen Elizabeth the lands were to be held of the Crown by homage and payment of one-fifth part of the gold and silver ore for all services, duties, and demands.

The Settlement of Virginia.—Actual settlements do not appear to have been made under these patents of discovery until the reign of James I. That monarch possessed a genius for colonisation. He established in the Highlands and Western Isles of Scotland, and in the northern counties of Ireland colonies of people brought from more industrious communities; he became interested from the first in the projected settlement of Virginia, and, it is said, personally drafted the letters patent of 1606 under which territories in North America were conferred on Sir Thomas Gates and his associates. The colonists were divided into two companies: the one, of adventurers from London, was called the first colony; the other, of merchants from Bristol and other Western towns, was named the second. It was declared that the colonists and their children should at all times enjoy the same liberties as if they had remained or were born within the realm of England. The government of each colony was vested in a council of thirteen, to be appointed by the Crown, with power to order all matters and causes according to Ordinances by the Crown and under the Privy Seal.

A council of thirteen was also to be appointed in England, to be called the Council of Virginia, for the superior management and direction of the two colonies. The tenure of the lands was of the Crown, as of the royal manor of East Greenwich, in the county of Kent, in free and common socage only, and not in capite.

In the first Charter of Virginia the Crown assumed direct legislative powers, and in the Charter of New England legislative power was vested in the council at Plymouth, incorporated by the Crown for the government of that colony; but in the Charter of Maryland, of 1632, by Charles I. to Lord Baltimore, the legislative power was vested in the Governor and the freeholders of the territory.

The Settlement of the West Indian Islands.—Charles I. had, however, in 1627, formed a colony of the West Indian Islands by making them into a province and vesting the same and its government in Lord Carlisle, with a proviso that all laws were to be made "*de et cum consilio assensu et approbatione liberorum tenentium ejusdem provinciæ vel majoris partis eorundem,*" so as, notwithstanding, the said laws should be agreeable as near as conveniently might be to the laws, statutes, customs and rights of the Kingdom of England, and not repugnant thereto and to reason. The territory comprised in this royal grant included the following, as well as other islands in the Caribbean Sea—namely, St. Christopher, Grenada, St. Vincent, St. Lucia, Barbados, Dominica, Guadelupe, Antigua, Montserrat, Nevis. This Charter is of historic interest, being a complete scheme for the creation, settlement, and government of a new colony. As regards the land tenure of this province the grantee was created absolute lord of the region under true faith and allegiance to the Crown, and the grantee, his heirs, and assigns were to hold of the king of England in capite by knight's service and by a yearly rent and the gift of a white horse to the king if he came within the region, and payment of one-fifth part of all gold and silver ore found therein.

Barbados.—The Constitution of Barbados, as settled and confirmed by the Commonwealth of England, 1652, was as follows:

That the government of this island be by a Governor, Council, and Assembly, according to the ancient and usual custom here; that the Governor be appointed by the States of England, and from time to time received and obeyed here, the Council be by him chosen, and an Assembly by a free and voluntary election of the freeholders of the island in the several parishes; and the usual custom of the choice of the Council be represented by the Commissioners to the Parliament of England, or to the Council of State established by authority of Parliament, with the desires of the inhabitants for the confirmation thereof for the future.

It has been necessary to refer at some length to these old Charters in order to gain a clear perception of the primary constitutional relations to the Crown of our earliest colonies, including those in the West Indies.

Confederation.—The term confederation is in strictness only applicable

to a federal union of independent sovereign states ; but it has been employed to indicate a policy which was once in the ascendant with the advisers of the Crown on Colonial matters. It is necessary to glance at the causes which gave rise to the policy which has been thus designated.

Early State Policy.—Before the era of the economists and free trade, the relations between the colonies and the home country were regulated by the now exploded maxims of the mercantile system. Whilst that system was in force the channels of Colonial trade were monopolised by English statesmen for the benefit of the shipping and other commercial interests of the home country ; and in return for the benefits which were supposed to arise from the monopoly thus secured the colonies were pampered with all the devices of the protectionists. But when free trade dispelled the illusions which lay in this vicious circle of the protectionists, public opinion demanded that the people of the home country should not be taxed in order to support a protectionist *régime* for the colonies. The extreme section of this anti-Colonial party insisted upon complete severance from the colonies, whilst the more moderate urged the necessity of making the colonies provide, out of their own resources, adequate contributions towards the cost they entailed upon the home country. The Imperial Government had never countenanced the extreme views of the anti-Colonial party, but its Colonial policy was modified to the extent of requiring each colony to bear in mind that the day would come when they must rely more and more upon their own resources for all the ordinary contingencies of administration.

Its Influence on the West Indies.—The West Indies could not expect to escape the influence of this policy. But its operation upon them would from the first take a different form from that which it would take in some of the larger and more territorial colonies. With these the ultimate aim of the English Government was to make them self-dependent—capable, out of their own resources, of providing for their own protection. No such future could, however, be entertained for the West Indies. They were split up into island communities, separated from each other by miles of sea. Moreover, no English statesman could mistake the import of a West Indian census with its subdivision of population into white, coloured, and black. It required no Jamaica insurrection to demonstrate an eventuality against which the Imperial Government was bound to provide in colonies of mixed races. Otherwise, at any moment, it might find itself involved in military operations of a costly and unpopular character. The eventuality of a European or American war in which this country might be engaged must be left out of consideration. In such a case the safety of the West Indies and the protection of its commerce must fall upon the Imperial navy. This, however, would be a liability common to all the colonies—one which no efficiency of administration on their part could neutralise. But the liability incident to the government of a colony of mixed races,

wherein the governing race was numerically a small fraction of the whole population, might be reduced to a minimum by firm and judicious administration and a strong executive, and by bringing, as was done in Barbados, cheap, prompt, and impartial justice at the hands of stipendiary magistrates within reach of every member of the labouring classes.

That strong executive could, however, be no other than the power of the Crown acting through its constituted nominee or through some executive council. The colony might possess some form of legislative assembly. It might enact laws subject to the veto of the Crown. In short, the home Government would guarantee law and order for the security of life and property in the colony, but, in order to reduce the liability under this guarantee to a minimum, it must retain a controlling voice in the legislation and a controlling power in the administration of the law. That view prevailed at the Colonial Office.

Controlling Power of the Crown.—As we glance through the constitution of the several West Indian colonies we find this controlling power more or less operative over all the legislative and administrative functions. Moreover, an English Act of Parliament binds the colonies if it names them, and would thus override any Colonial Act with which it might come into conflict.¹ And the ultimate jurisdiction in every colony is vested in an appeal to the Queen in Council. We thus see what a modified autonomy each colony possessed—modified not in any limitation of the scope of its authority, but in the fact of its absolute dependence upon a power external to itself. It is necessary to bear this in mind, lest the terms “House of Assembly,” “Legislative Council,” should imply that complete autonomy which has all sovereign power inherent in itself.

On the other hand, it must not be supposed that the “House of Assembly” was a mere grand name for a body exercising functions more or less akin to those exercised by a parochial vestry or a borough council under some Local Government Act.

Legislative Power in the West Indian Colonies.—Saving the fact of its subordination to the supreme authority of the English Parliament, the legislative power of each colony was unlimited. It might range over the whole sphere of the law of persons and property. And more than one West Indian colony can produce in its Statute Book a very creditable testimony to the wisdom and ability with which it has exercised its legislative powers. But from time to time serious complaints arose from many of the colonies. It was found that the legislative machinery would not work on so small a scale. It was impossible in small communities, out of a limited constituency, to find the requisite legislative capacity; local matters might receive efficient attention, but the more important enactments incidental to the law of persons and property were left in a crude and

¹ Any doubts which might formerly exist as to the supremacy of the English Parliament seems now set at rest by the Colonial Laws Validity Act, 1865.

unsatisfactory condition. The administration of justice, too, was not generally settled on so satisfactory a basis as that in Barbados, and discontent began to manifest itself. The outbreak in Jamaica startled the people of this country, and riveted public attention to the fact that in the West Indian colonies the English Government was responsible for the contentment and good order of a large black population. After the Jamaica outbreak the old Constitution was abrogated, and that colony became subject to the direct responsible Government of the Crown. It lost its right of self-taxation.

Consolidation of the Leeward Islands.—In 1871 the Leeward Islands Act was passed, and thereupon the islands of Antigua, Montserrat, St. Christopher, Nevis, and Dominica, with their respective dependencies, and the Virgin Islands, became one colony. In 1876 the island legislatures of St. Vincent, Tobago, and Grenada abrogated their Constitutions and gave power to the Crown in Council to create a new form of Government and Legislature. These local Acts had effect given to them by the Imperial Act of 39 & 40 Vict., No. 47.

Crown Nominees.—The system of introducing Crown nominees into Colonial legislation has been thus condemned by Mr. Arthur Mills in his work on *Colonial Constitutions*:

Except in those languid Colonial communities in which no institution could provoke intolerance or excite enthusiasm, nominated legislative councils have been generally regarded simply as the creatures of patronage or the instruments of despotism.

And in a note to this passage the author says :

It was for the alleged purpose of counteracting the convict element, to which absolutely free institutions might, it was thought, have then given undue prominence, that a composite Chamber, of which one-third were nominees and two-thirds elected members, was established in South Wales in 1841. This form of constitution was extended to South Australia and Van Diemen's Land by the Australian Colonies Government Bill of 1850. It was in reference to the provisions of this Bill that a late member of the Council of New South Wales thus avowed what he declared to be the general opinion in the Australian colonies respecting nominated legislative councils :

"If there be any one institution which tends to bring the Home Government into collision with the colony, to disturb the action of the constitutional system, to throw discredit upon public men, to introduce discord into the public councils, and to create every disturbance which it is desirable to exclude from the deliberations of a Legislative Assembly, it is the institution of Crown nominees. They represent nobody; they have not the slightest affinity to an aristocratic institution; they are the scapegoats of the Constitution, the target for every attack, the butt of every jest. Ignominy and obloquy rain thick upon them; and when it is asked whether the Colonies have materials for a second Chamber, the question may, I think, with more propriety be put, Can they have materials for nominees? Can they have people so paramount in talent, so independent in property, so conciliatory

in manner, so combining all sorts of contradictory attributes, that they can hold this invidious office without exposing themselves to the sort of treatment to which I have alluded? That I think is impossible, and it is not my opinion alone, but that of almost every person through the Australian Colonies."¹

Sketch of Present Constitutions.—At the present date the Constitutions of the West Indian dependencies are as follows:

1. THE BAHAMAS—

Executive: The Governor.

The Executive Council of nine members, who have seats in one or other branch of the Legislature.

Legislative: The Governor.

The Legislative Council of nine nominated members.
The Representative Assembly of twenty-nine elected members.

2 BARBADOS—

Executive: The Governor, with an Executive Council and an Executive Committee which includes the Governor and the Executive Council, together with one member of the Legislative Council and four members of the Assembly, nominated by the Governor.

Legislative: The Governor.

The Legislative Council of nine members, nominated by the Crown.

The House of Assembly of twenty-four members, elected annually on the basis of a moderate franchise.

3. JAMAICA—

Executive: The Governor, with a Privy Council of members nominated by the Crown.

Legislative: The Governor.

The Legislative Council of six ex-officio, five nominated, and fourteen elected members.

4. LEEWARD ISLANDS (consisting of the five presidencies of Antigua, St. Christopher and Nevis, Dominica, Montserrat, and the Virgin Islands in one colony).

Executive: The Governor.

The Executive Council, nominated by the Crown.

Legislative: The Governor.

The General Legislative Council, consisting of ten nominated and ten elective members, chosen

¹ Speech of the late Lord Sherbrooke (Mr. Lowe) at a Meeting of the Society for the Reform of Colonial Government, held June 1, 1850.

by the unofficial members of the island councils of Antigua, Dominica and St. Christopher, with Nevis, out of the three respective island councils.

Each of the five presidencies has local executive and legislative councils composed of non-elective members.

5. TRINIDAD AND TOBAGO—

Executive: The Governor.

The Executive Council of seven members.

Legislative: The Governor and

The Legislative Council composed of the Governor as President, and nine official and eleven unofficial members, all nominated by the Crown.

6. THE WINDWARD ISLANDS, comprising Grenada, St. Vincent, and St. Lucia grouped under one Governor in 1885.

Executive: The Governor.

Grenada—

Executive: The Executive Council, consisting of the Governor and Crown Nominees.

Legislative: Legislative Council, consisting of the Governor and five official members nominated by the Governor, and seven unofficial nominated by the Crown for six years.

St. Lucia—

Executive: The Executive Council, consisting of the Administrator and official members.

Legislative: The Legislative Council, consisting of the Administrator and official and unofficial members nominated by the Crown.

St. Vincent—

Executive: The Administrator and Executive Council.

Legislative: The Legislative Council, consisting of the Administrator and four official and four nominated unofficial members.

Self-taxation and Independence.—The right of self-taxation is a security for Colonial liberty. Once let a colony lose this right, and nothing remains for its security against official domination in all its local affairs except pathetic and probably fruitless appeals to the mother country. And in that case the colony will soon find out the truth of the view put forward by Bentham, when writing on the Colonies:

The Sovereign, at two thousand leagues' distance from his subjects, can be acquainted neither with their wants, their interests, their manners, nor their character. Their most legitimate and weighty complaints—weakened by reason of distance, stripped of everything which might excite sensibility, of everything which might soften or subdue the pride of power—are delivered without defence

into the cabinet of the prince to the most insidious interpretations, to the most unfaithful representations. The colonists are still too happy if their demand of justice be not construed into a crime, and if their most moderate remonstrances are not punished as acts of rebellion. In a word, little is cared for their affection, nothing is feared for their resentment, and their despair is contemned. The most violent procedures are easily disguised under an appearance of necessity, and the best intentions will not always suffice to prevent the sacrifice of the public to private interests.

Conclusion.—The conclusion seems to be that the policy of so-called “confederation” has evolved complication rather than simplification in the government and legislatures of the West Indian communities. The abrogation of the representative element in several of the islands has rendered them voiceless communities; they have no longer any power to speak by a representative vote. The real bond of union is the Crown. The desire for union seems satisfied by the common allegiance; but for unity into one colony, province, or dominion, no desire is apparent, nor would it be easy to give effect to such a desire were it to arise. These island communities of British subjects should all possess some simple means of voting by elected representatives their own taxation, and an address when necessary to the Crown. The islands are separated by miles of sea; and to a closer and more territorial political union it may be said, *opposuit Natura*.

THE LAW OF SOUTH AFRICA.

[Contributed by W. F. CRAIGS, ESQ.]

Conquered Territory and British Policy.—It has been the general policy of the British Crown in dealing with conquered territory to interfere as little as possible with the existing laws and customs of the inhabitants of the territory. In pursuance of this policy the Law of old France was left standing in Lower Canada, and that of Spain in Trinidad. But soon after the conquest of Canada the Crown Law of England was substituted for that of France;¹ and during the present century the old French Law, already abolished in France, was found to be unsuited in form and substance to the needs of the province, and the feudal land tenures imported from France were abolished by the Canadian Legislature. The Civil Law, till then resting on the *Coûtume de Paris*, was codified, partly on the model of the *Code Napoléon*, partly in conformity with English Law; and local government rests on Colonial legislation and not on French Law.

In Trinidad the inconvenience of preserving Spanish Criminal Law was shown in *Picton's* case (30 St. Tr. 225), where it was suggested that judicial torture was legal under that law; and by a process discussed in detail in this Journal² the English Law has been substituted for the Spanish, except in a few cases.

The changes in Trinidad—an isolated colony with a small white population—are precedents of secondary importance. In the case of Canada, however, it is to be noted that the French Law has been restricted to a single province, in which the population of French origin is in a very large majority, and does not extend to any of the other provinces, all of which are under the English Common Law as modified by provincial and federal legislation. And at the present time no serious difficulties arise in colonies acquired from France or Spain in the ascertaining or administration of so much of the old French or Spanish Law as has survived local legislation.

Roman-Dutch Law in the Empire.—But there remains another system of law which has been preserved in the British Empire in pursuance of the policy already indicated, and it is the Roman-Dutch Law. When the province of New York was taken from the Dutch, the English Common Law was substituted for Dutch Law. But on the conquest of Ceylon a Royal

¹ See the Quebec Act (149 3 c. 83), s. 11.

² *Journal of Comparative Legislation*, 1st Series, vol. i., p. 318.

Proclamation, dated September 23, 1799,¹ was promulgated. By Articles 1 and 2 the Roman-Dutch Law was preserved, with the abolition of certain cruel modes of punishment permitted by that law, such as breaking on the wheel, and the practice of examination of accused persons by means of torture.²

On the conquest of British Guiana the Roman-Dutch Law, so far as it applied to that territory, was continued under stipulations in the Articles of Capitulation of 1803.³ And in the Cape Colony the Roman-Dutch Law, so far as there in force in 1806, was preserved on the final cession in 1815. At that time the white inhabitants of South Africa were almost wholly of Dutch or Huguenot descent, speaking a dialect of Dutch which has now developed into what is known as the Taal, and the territory was occupied in the main, as it had been occupied by the States of Holland,⁴ as a half-way station on the sea route to India and China.

With the extension of British sovereignty in South Africa outside the original limits of the Cape Colony, the Roman-Dutch Law, with or without the modifications affected by Cape legislation, has by degrees been extended to each new territory.⁵ The Orange River territory, while under British dominion, came under the same *régime*, and the grant of independence has not affected this. The settlers in the Transvaal took with them the law of the colony from which they trekked.

The result is, to use the words of Chief Justice Kotze, that

"In all the South African colonies and States the Roman-Dutch Law, as it prevailed in Holland previous to the introduction of the Code into that country, is still in force,"⁶

subject, of course, to changes effected by legislation.

But he adds that—

"By a local statutory provision the Courts of Justice in the Transvaal must regulate their decisions agreeably to the law as laid down

¹ Printed in *Stat. R. and O. Rev.*, vol. viii., p. 414. For the Charter of Justice of the colony granted in 1833, vide *loc. cit.*, p. 416.

² Compare the abolition of torture in Scotland on its union with England (7 Anne, No. 21, s. 8).

³ Printed in *Laws of British Guiana* (rev. ed. of 1895), vol. i., p. 8.

⁴ See *Thurburn v. Steward* [1871], L.R. 3 P.C. 511.

⁵ Basutoland, by Order in Council, November 3, 1871. The Order in Council of February 2, 1884 (*Stat. R. and O. Rev.*, vol. viii., p. 392), disannexing Basutoland from Cape Colony, preserves the laws in force in the severed territory until altered by the High Commissioner in South Africa. British Bechuanaland was incorporated in the Cape Colony by Order in Council of October 3, 1895 (*Stat. R. and O.*, 1895, p. 738). The Cape Colony laws had previously been put in force there by Proclamation of October 6, 1885. The Transkei territories have also been added to the Cape Colony; the latest, Pondoland, in 1894 (see *Sprigg v. Sigau* [1897], App. Cas. 238). The Law of Southern Rhodesia is regulated by an Order in Council of October 20, 1898 (*Stat. R. and O.*, 1898, p. 385), made under the Foreign Jurisdiction Act, 1890, which appears to apply the Law of the Cape Colony as it stood on June 10, 1891, subject to certain modifications.

⁶ Kotze, C. J., *Introduction to Translation of Van Leeuwen's Commentaries*, p. 7. Cf. *Denysen v. Mostert*, L.R. 4 P.C. 236.

in the *Introduction* of Grotius (1630), the *Commentaries* of Van Leeuwen (1678), and the *Institutes* of Van der Linden (1806); but when these authorities differ or are silent on any given point, the Courts must decide in accordance with the general practice obtaining in South Africa."¹

"In certain branches of law, such as mercantile law, insolvency, and procedure, a great many new doctrines have from time to time, by judicial decision and legislative enactment, been engrafted on to our Dutch jurisprudence, assimilating it in some respects to the English system; but the Common Law of South Africa is unquestionably the Roman-Dutch Law, as it obtained in the Netherlands at the commencement of the present century."²

Roman Law was adopted in Holland not as the Common Law, or *coutumier*, of the country, but as a common law of nations, and used in cases where particular laws or customs failed.³ But the Feudal Law and a multiplicity of local ordinances and customs overruled or varied it in many details; and in substance the duty of the Dutch Courts was to do justice according to the laws and ordinances of the land, according to the privileges and well-established customs and usages,⁴ and in default of these according to the written (*i.e.* the Roman) law, which was received partly *in subsidium*,⁵ and partly by full adoption,⁶ as to subjects on which the native law was silent.

Extinction of Roman-Dutch Law in Holland.—So far as Holland is concerned the Roman-Dutch Law is now absolutely dead, having been superseded by a series of Codes apparently based on the French Code; and no attempt has been made since 1815, nor after the separation of Belgium in 1831, to restore the former law or the diversity of local customs by which it was varied in the different provinces of Holland. Holland is now governed by Codes or Statute Law framed in the main on French precedents. The result of this is that there is no living system of jurisprudence like the Common Law of England to which lawyers in the three colonies can resort for the elucidation of difficulties arising under the seventeenth-century form of Roman-Dutch Law which the colonists carried abroad with them; and this is so far recognised in Holland that the States General lately passed a grant for establishing in Dutch universities classes of South African Law.

¹ *Van Leeuwen*, translated by Kotze, p. vii.

² *L.c.*, British Maritime and Shipping Law was always administered by the Cape Vice-Admiralty Court, but was also applied to cases in the Supreme Court by Act No. 8 of 1879, in consequence of a conflict which had arisen between that law and Roman-Dutch Law (*Smith v. Davis*, 1878, Buchanan, Cape S.C., 66).

³ *Van Leeuwen*, ch. 1, s. 11.

⁴ *Van der Linden*, translated by Sir H. Juta, p. 3.

⁵ Cf. M. de Villiers, *Roman and Roman-Dutch Law of Injuries*, p. 13.

⁶ Van der Keessel, *Select Theses on the Laws of Holland and Zeeland* (2nd ed.), 2.

Roman-Dutch Law in Ceylon: Its Decay.—The inconveniences of this condition of affairs are obvious. The position in Ceylon is thus stated by Mr. Justice Clarence in an article in this Journal (1st Series, vol. i., p. 231)¹:

One unfortunate incident in the substantive law is the survival of the Roman-Dutch Law. The continued existence of remnants and traditions of this law in a decaying and semi-obsolete condition has been the parent of much unwholesome uncertainty. As the Dutch lines recede farther into the past, the doctrines of the Roman-Dutch Law of the past century become less and less applicable to the present condition of life. Theories and remnants of procedure originally founded on Dutch institutions no longer extant still linger to hamper and confuse the administrator of justice. Lawyers are largely educated from English text-books, and few can read the Latin of the Roman-Dutch jurists. Yet, in spite of wholesale introductions by Statute of English Law, pure and simple, in various departments, various remnants of Roman-Dutch doctrine still lurk in all directions. Some years ago, in a litigation between members of a Sinhalese family, much expense and delay was occasioned by the question whether under certain circumstances of a succession under an intestacy the inheritance should devolve according to the Dutch Law of North Holland or South Holland. An Ordinance of 1876 for the regulation of matrimonial rights now provides for the matter.

And he adds:

It would be a boon to all classes of the community if the vestiges of Roman-Dutch Law were now finally swept away.

To this it may be added that it has been found expedient to adopt the English Law as to bills of exchange, banking, carriers by land, insurance, maritime matters, principal and agent, partnership, sale of goods, and shipping. In this respect the colony follows the general tendency of Colonial legislation, which is to adopt the commercial law of the mother country. But Ceylon has also adapted from Indian models Codes of Civil (1889) and Criminal (1893) Procedure, a Penal Code of 1883,² and an Evidence Code (1895), with the result, as stated by Mr. Justice Clarence, that with the exception of certain customary law of the different native communities, the law of the colony rests mainly on legislation, with only a small and inconvenient residuum of the Roman-Dutch Law, which governs both Europeans and natives where ordinances and native customary law are silent.

— in **British Guiana.**—In British Guiana the Roman-Dutch Law as to crimes and criminal procedure has been abolished, and with reference to these matters the Law of England applies when the legislation of the colony makes no specific provision; but for the most part the subject is governed by Consolidation Ordinances.³ British Mercantile Law has also

¹ In his opinion he differs from that expressed in 1854, in favour of the general superiority of the system of Dutch jurisprudence over the English in point of simplicity, and completeness, and freedom from technicality and refinement (see Preface by Lorenz to *Translation of Van der Keessel's Theses on Dutch Law*.)

² Even prior to that date Roman-Dutch Criminal Law had gradually become obsolete, and had been superseded by a sort of criminal equity.

³ See Ordinance No. 18 of 1893.

been applied by Colonial Ordinance ; and the Ordinances of the colony from 1774 to 1895 have been collected and consolidated, revised and edited, under legislative authority in a manner which will make codification easy when and if it is deemed necessary, and which affords an excellent precedent for other colonies.¹

— in *South Africa*.—In South Africa the Dutch-speaking element in the population is proportionately far greater than in Ceylon and British Guiana. But until recent years the intercourse with Holland, and resort to that country by Cape Dutchmen, have been comparatively small, and Hollanders have not emigrated much except to hold Government posts in the Transvaal.

The inconveniences in the administration of South African Law arising from resort to a defunct system are best indicated by reference to the opinions of eminent South African jurists. In *R. v. Kaplan* [1893] 10 Juta 259, Sir Henry de Villiers said, "considering the uncertainty and want of precision which characterises the Criminal Law of Holland, this Court has always deemed it its duty to adhere to any rule of Criminal Law practice once established." And on another occasion he pointed out that the punishment of breaking on the wheel for treason and other like cruelties of that law had never been formally abolished in the Cape.² But the Charter of Justice of 1832 introduced the system of trial by jury in criminal cases, and much has been done by legislation to substitute the English rules of law and evidence in criminal cases ; and as regards criminal libel, the English Law was adopted bodily in 1882. Of the Dutch Law of Crime this much alone is clear, that justice is not administered in Holland according to the laws of Moses :³ and the difficulties of ascertaining and applying the old law in civil cases are very considerable. In *Seaville v. Colley* [1891], 9 Juta 39, the Court had to determine—

- (1) The nature of the *lex Anastasiana* as to *retraction* ;
- (2) The modifications of that law by the Dutch Courts ;
- (3) Whether the law, as modified, was so far applicable to the Cape Colony as to have been carried there by the settlers.

In giving judgment, Chief Justice de Villiers, at p. 44, said :

"As to Statutes enacted by the Legislature of this colony since 1806, I should have great difficulty in holding that disuse for any length of time would be sufficient to abrogate it. They were duly promulgated at the time when they were enacted, and have all been published in authentic form. If such a Statute is no longer required, the Legislature, which must be presumed to be acquainted with the body of its own Statute laws, is at hand to enact the repeal.

¹ *Laws of British Guiana*, 1774–1895, five vols.

² It is not infrequently found difficult to find how far a crime known to Roman-Dutch Law is recognised in the Cape Colony, and what is its appropriate punishment. See *R. v. Fortuin* [1883], 1 Buchanan Cape Ct. App., 290.

³ Van der Kessel, *Theses* (2nd ed.), p. 1.

But the body of laws introduced from Holland, the Statutes of India, and the local Statutes passed before 1806, stand on a different footing. They are not all to be found in any code or authentic document to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law that the Legislature becomes aware of the existence of a particular law. The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this colony at the date of the British occupation in 1806 may be briefly stated. The presumption is that every one of these laws, if not repealed by the Local Legislature, is still in force.¹ This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by an overruled judicial decision. In the absence of such decision the Court may take judicial notice of any general custom which is not only well established, but reasonable in itself. Any Dutch law which is inconsistent with such well-established and reasonable custom, and has not, although relating to a matter of frequent occurrence, been distinctly recognised and acted on by the Supreme Court, may fairly be held to have been abrogated by disuse."

Perpetuation Undesirable.—The result of permitting the continuance in South Africa of so much of the Roman-Dutch Law as has survived local legislation, and can be ascertained and is applicable to South African conditions, and is not obsolete, is obviously to perpetuate unnecessary difficulties in the administration of justice. When half, or perhaps now more than half, of the white population is not of Dutch origin, and the vast majority of the population is not of European origin, it would, apart from sentiment, seem as undesirable as it has been found in Ceylon to continue to require the ascertainment of much of the South African Law from seventeenth or eighteenth century books, which are either in mediæval Latin or in a form of Dutch widely different from the South African dialect, and which have, for practical use, to be translated into English.

South African Federation.—If federation of the South African colonies and states is contemplated, it is obviously expedient that they should have, as Canada has, a common system of Criminal Law and Procedure, and that the Commercial Law, including Insolvency Law and the Maritime Law and the Law of Contracts, should be common. And we may go further and say, that one of the best means of creating a united South Africa is to create a system of South African Law not by substituting the Common Law of England for the Roman-Dutch system, but by a

¹ See *Thurburn v. Steward* [1871], L.R. 3 P.C. 478, where it was held that a *placaat* of the Emperor Charles V. of October 4, 1540, formed part of the law of the colony, and had not been affected by Colonial legislation.

proper and systematic creation of a series of South African Codes dealing completely and effectively with the main branches of law. This was the policy of unification in the Code Napoléon which swept away the local laws of France. This is the present policy of the German Empire in its codes; and Italy has completed unification by codification. If such a plan be adopted, neither the British nor the Dutch in South Africa need refer to the systems of Europe, or quarrel about the merits of the laws of their domicile of origin. They could use in common a system of law framed, with a view to South African requirements, by judicious selection from the laws of other countries of that which seemed best suited for their local needs. There are no doubt many Statutes in force in the different states in South Africa of a purely local character, which need at most only collection and consolidation, and could not properly be made parts of a general Code. These laws only call definitely for common action, which under a federal system would fall under the control of the Federal Parliament.

The Present Opportunity.—The present time seems auspicious for undertaking this task, if it should be undertaken. On the conclusion of the present war, which will apparently involve the annexation of the two Republics, there will undoubtedly be a period of Crown Colony or military government. And the laws of the Transvaal will certainly call for scrutiny by the light of the Convention, which many of them are said to violate. During the period which must elapse before representative government is re-granted, there would be an admirable opportunity of constituting an efficient commission, constituted of lawyers versed alike in South African and English Law, and possibly also in the Law of Scotland, which is probably much nearer to that of Holland than our own. This commission could frame, for use in the Orange River and the Transvaal, codes agreed in consultation with lawyers of the Cape and Natal, with reference to such subjects as we have indicated, and probably as to other subjects. There is little doubt that, quite apart from any federal arrangement, such codes, if carefully framed and judiciously discussed, would be adopted by the colonies which now have autonomous government. And it is not unreasonable to suppose that the labours of such a commission would tend to what all desire, irrespective of flag—the gathering of the Europeans in South Africa into one friendly camp, and so lessen the friction now created by the Roman-Dutch ideals and methods of one half of the white population.

NOTE.—After this paper was in print the writer's attention was called to a paper by Sir Sidney Shippard, K.C.M.G., on the administration of justice in South Africa, published in the *Proceedings of the Royal Colonial Institute*, for 1896, 1897 (vol. xxviii., p. 81). Sir Sidney Shippard's well-known ability, and his experience as a judge in South Africa, give special weight to his opinion as to the improvement effected under English influence in the administration of justice in South Africa, and by legislation which has removed some of the more inconvenient relics of Roman-Dutch Law; and it will be found that he considers that in certain directions South Africa would greatly gain by a still further the adoption of English substantive law, especially in criminal and commercial matters.

APPEALS UNDER THE COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT.

[Contributed by A. R. BUTTERWORTH, ESQ.]

Regulations as to Appeals.—The Commonwealth of Australia Constitution Act having now become law, it may be useful to consider the effect of those provisions of the Act which relate to appeals, and to contrast them with the previous law regulating appeals from the Australian Colonies, and with the original provisions of the Bill transmitted to England by the federating colonies, and also with the law regulating appeals from Canada. In order to do this it is necessary to examine in detail some of the provisions of the original Bill and also of the Act, especially those contained in s. 74, which have recently led to much discussion and negotiation.

By s. 73 of the Constitution Act the High Court will have jurisdiction to hear appeals from all judgments, decrees, orders, and sentences of the Supreme Court of any State, "and the judgment of the High Court in all such cases shall be final and conclusive."

Art. 74 of the Draft Bill,¹ transmitted to England by the five federating colonies—*viz.* New South Wales, Victoria, South Australia, Queensland, and Tasmania—was in the following form :

74. Appeals to Queen in Council.—No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's dominions, other than the Commonwealth or a State, are involved.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative, to grant special leave of appeal from the High Court to Her Majesty in Council. But the Parliament may make laws limiting the matters in which such leave may be asked.

Indefiniteness of Clause 74.—The vague terms of this Clause laid it open to serious objection, the main grounds of which are very clearly stated in a memorandum, dated March 29, 1900, setting out the objections of the

¹ This Bill is printed in the present volume of this Journal, *ante*, pp. 151-172; s. 74, at p. 164.

Government to some provisions of the Bill.¹ The following among other grounds of objection are there pointed out:

It is impossible to say what construction would be placed on this Article when it comes to be judicially interpreted. There may be large classes of cases just on the border-line with regard to which it cannot be predicted whether they, do or do not involve the interpretation of the Constitution.

It may fairly be argued that any question as to the validity of the exercise of legislative powers by the Legislature of the Commonwealth is a matter involving the interpretation of the Constitution. Questions may arise whether legislation under any of the powers mentioned in paragraphs i., ix., x., xix., xx., xxvi., xxvii., xxviii., xxix., xxx., xxxvii., and xxxviii. of Art. 51² of the Constitution is or is not *ultra vires*, and any such legislation may involve matters affecting foreigners and foreign ships in Australia and in Australian waters and their Treaty rights. Yet as the clause stands there would be no right of appeal from the High Court to the Privy Council in such cases.

* * * * *

A grave objection to Art. 74 is the absence of any definition of the class of cases in which "the public interests of some part of Her Majesty's dominions, other than the Commonwealth or a State [are involved]."

Does this phrase include the interests of a large class of persons in Her Majesty's dominions—say of investors in Australian securities, or of a body of shareholders in an industrial undertaking formed, say, in the United Kingdom, to carry on some great commercial enterprise in Australia—or is it confined to cases in which the interests affected are only those of the government of other parts of Her Majesty's dominions?

If the latter is the true meaning, the proviso would have little or no operation. If the former, no task can be conceived more difficult than that of deciding whether or not the condition of the Article has been satisfied.

The view taken in the Memorandum of the delegates is that the prerogative of granting leave to appeal to the Privy Council from the Supreme Courts of the several colonies is unaffected, and that Art. 74 only applies to appeals from the High Court of the Commonwealth.

This is very doubtful, and is only one of the many difficult questions of construction which would arise upon this Article. The Article appears to have been framed under the impression that the only appeal from the Supreme Courts of the Colonies was to be to the High Court of the Commonwealth, and its effect upon the right of Her Majesty to grant leave to appeal to the Privy Council from the judgments of Supreme Courts of the Colonies is problematical.

If, however, the view taken by the Delegates on this point be correct, the result will be that in a Constitutional case a litigant defeated in the Supreme Court of a State might appeal at his option either to the High Court of the Commonwealth or to the Privy Council. The successful party might prefer the latter, but would have no choice.

Again, if the Delegates' view as to the construction of the Article is correct, in the case of a decision by a Superior Court with which neither litigant is satisfied, there may be cross appeals, one by one party to the High Court, and the other by the other party to the Privy Council. The decisions of both of these Courts

¹ Printed in *Further Papers relating to the Federation of the Australian Colonies*, May, 1900 (Cd. 158), pp. 24 *et seq.*

² See Art. 51, *infra*.

may be final; and if they happen to disagree, it is difficult to see what will be the consequence.

Further, under Art. 74, it would in many cases be possible for a litigant to present a Petition to the Queen in Council for special leave to appeal, on the ground either that the question at issue did not involve the interpretation of the Constitution, or that public interests were involved, and on this Petition there would be a preliminary argument on either or both of these points.

To pass this Article in its present form would be to introduce confusion and uncertainty in a matter in which it is desirable above all others that there should be clearness and certainty. The difficulty of construing it forms an insuperable obstacle to its adoption by the Imperial Parliament without modification or some overriding clause in the Bill to control its operation.

Variety of Matters for Interpretation.—A perusal of s. 51, which confers on the Federal Parliament powers of legislation, is necessary to enable one to realise the large number of matters likely to arise which will involve “the interpretation of this Constitution,” while such a perusal makes it evident that many difficult questions may be raised as to whether legislation is or is not *ultra vires* under other paragraphs than those specified in this memorandum.

The section is as follows :

51. Legislative Powers of the Parliament.—The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :

- (i) Trade and commerce with other countries, and among the States :
- (ii) Taxation ; but so as not to discriminate between States or parts of States :
- (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth :
- (iv) Borrowing money on the public credit of the Commonwealth :
- (v) Postal, telegraphic, telephonic, and other like services :
- (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth :
- (vii) Lighthouses, lightships, beacons, and buoys :
- (viii) Astronomical and meteorological observations :
- (ix) Quarantine :
- (x) Fisheries in Australian waters beyond territorial limits :
- (xi) Census and statistics :
- (xii) Currency, coinage, and legal tender :
- (xiii) Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money :
- (xiv) Insurance, other than State insurance ; also State insurance extending beyond the limits of the State concerned :
- (xv) Weights and measures :
- (xvi) Bills of exchange and promissory notes :
- (xvii) Bankruptcy and insolvency :
- (xviii) Copyrights, patents of inventions and designs, and trademarks :
- (xix) Naturalisation and aliens :

- (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth :
- (xxi) Marriage :
- (xxii) Divorce and matrimonial causes ; and in relation thereto parental rights, and the custody and guardianship of infants :
- (xxiii) Invalid and old-age pensions :
- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States :
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States :
- (xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws :
- (xxvii) Immigration and emigration :
- (xxviii) The influx of criminals :
- (xxix) External affairs :
- (xxx) The relations of the Commonwealth with the islands of the Pacific :
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws :
- (xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth :
- (xxxiii) The relations, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State :
- (xxxiv) Railway construction and extension in any State with the consent of that State :
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State :
- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides :
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law :
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia :
- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

The Appeal Section as Passed.—Meanwhile, after much negotiation, s. 74 has been passed in the following form :

74. Appeal to Queen in Council.]—No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question howsoever arising as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Scope and Operation of Section.—It will be seen that this section has removed several of the difficult questions of construction which would have arisen on the original clause, and that it shows a marked improvement upon that clause in clearness and certainty. The expressions "any matter involving the interpretation of this Constitution," or involving "the public interests" of some other part of the Queen's dominions, have disappeared. As the section expressly deals only with appeals from the High Court, it is clear that it does not directly affect appeals from the Supreme Court of any State. It is considerably less restrictive than the original clause, for many questions may arise "involving the interpretation of this Constitution or of the Constitution of a State," which under that clause would not have been subject to appeal, but with regard to which appeals will not be prohibited under the present section, unless they come in the category of questions, "as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States." Even in these latter cases the High Court may "for any special reason" allow an appeal to the Privy Council, while in all cases not in this category special leave to appeal may be granted by the Privy Council. Again, the words "*inter se*" would still appear to limit the restriction to cases in which "the public interests"—if by that expression was meant the interests of the Government—of some other part of Her Majesty's dominions are not involved. The section, however, though less restrictive than that originally proposed, will stand as the first enactment on the English Statute Book, expressly limiting the prerogative right of the Queen in Council to hear the complaint of a British subject appealing to the Throne for a redress of grievances.

The power which it was proposed by the original Clause 74 to confer on the Federal Parliament to "make laws limiting the matters in which special leave to appeal may be asked, is granted by the present section, but its effect will, perhaps, be minimised by what is intended as a safeguard to the exercise of this power by providing that "proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

Its Defects.—Although by the amendment of Clause 74 several of the objections stated in the Memorandum of March 29, 1900, have been met, some apply to the section in its final shape. Under this section not

only in a Constitutional case (as put in the Memorandum), but in all cases whatever which involve more than £500, a litigant defeated in the Supreme Court of a State will now have the option of appealing either to the High Court or to the Privy Council direct. The successful party will have no choice, the selection of the appellate tribunal resting entirely with the unsuccessful party who appeals. It is in this indirect way that s. 74 materially affects the right of appeal from the Supreme Court of a State to the Privy Council; for the right of an appellant to appeal to the Privy Council has hitherto involved the correlative right of the respondent not to be deprived of the benefit of a judgment in his favour by any tribunal other than the Privy Council. In other words, under the law which has hitherto prevailed, a party who has recovered judgment in the Supreme Court of a colony in an ordinary action could not be deprived of that judgment in his favour unless his opponent appealed to the Privy Council and got the judgment reversed; but under the new law his opponent may elect to appeal to the High Court, and if that Court reverse the decision, the party originally successful will be deprived of the benefit of the judgment without there being any appeal to the Privy Council; for unless the case belongs to that limited class in which the Privy Council will grant special leave to appeal, the judgment of the High Court will, under s. 73, be "final and conclusive."

Appeal as of Right or by Special Leave: Distinction.—The distinction between a right of appeal, such as has hitherto existed from the judgment of a Supreme Court in all cases involving more than £500, and a liberty to apply to the Privy Council for special leave to appeal, such as is afforded by this Act from the judgment of the High Court in some of such cases, is a distinction which, though frequently overlooked, is one of the greatest practical importance. In the former case an appeal can be brought as of right, subject merely to the appellant making an application to the Supreme Court within the time limited and to his giving security for due prosecution of the appeal and payment of costs if awarded. Where, however, an application has to be made to the Privy Council for special leave to appeal, such leave will be refused in all ordinary cases, and will in no case be granted, according to the rules laid down in the well-known decision in *Prince v. Gagnon* [1882], "save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character,"¹ and even in such a case leave to appeal will not necessarily be granted. "Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition."²

¹ L.R. 8 App. Cas. 103, at 105.

² Judgment of the Judicial Committee delivered by Lord Watson in *La Cité de Montréal v. Les Ecclesiastiques de St. Sulpice* [1889], 14 App. Cas. 660, at 662.

The present Act therefore confers no general right of appeal from a decision of the High Court, such as has hitherto existed with respect to a decision of a Supreme Court. It merely enables an aggrieved party in an exceptional and comparatively rare class of case to obtain from the Privy Council special leave to appeal, and in certain other cases it empowers the High Court, "if satisfied that for any special reason the certificate should be granted," to certify that the question should be determined by the Privy Council.

Mode of Exercising the Power.—Whether this latter provision will give satisfaction or not must largely depend upon the mode in which the High Court exercises this power. It is not difficult to foresee cases in which grave dissatisfaction would be caused if the High Court were to refuse the certificate. Suppose, for instance, in a case falling within the first paragraph of s. 74, a company carrying on business in New South Wales were to bring a suit in equity in the Supreme Court of that colony for an injunction to restrain an officer of the Federal Government from enforcing some law alleged to be *ultra vires*, the Chief Judge in Equity might grant the injunction. On appeal to the full Court, constituted of the Chief Justice of New South Wales and two other Judges, the decision might be unanimously upheld. The defendant might appeal to the High Court, constituted of the Chief Justice of the Commonwealth and two other Judges. The former might approve of the decision, but his two colleagues might disapprove, and a decision against the Government approved by five Judges might be reversed by two. The case might be one arousing strong political feeling; but whether a certificate allowing an appeal in such a case to the Privy Council should or should not be granted would depend upon whether the two latter Judges were or were not "satisfied that for any special reason" it should be granted.

Original Jurisdiction of High Court.—The right of appeal from a Supreme Court will be further affected by reason of the original jurisdiction conferred by s. 75 on the High Court in certain matters, including matters "between States, or between residents of different States, or between a State and a resident of another State"; while by s. 76 the Federal Parliament is empowered to make laws conferring original jurisdiction in certain other matters; and by s. 77 with respect to the matters mentioned in ss. 75 and 76, the Parliament may make laws "defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is vested in the Courts of the States."¹ Hitherto, if a cause of action involving, say, £1000 arose wholly in New South Wales against a resident of Victoria, the latter might be sued in New South Wales, and either party had a right of appeal to the Privy Council. Under the Act, the High Court will have original jurisdiction in such a case; and if the plaintiff

¹ See Clauses 75, 76, 77 of the Bill, which have been passed without amendment, printed *ante*, pp. 164, 165.

elects to bring his action in that Court, there will be no appeal as of right (except indeed an appeal from a Justice of the High Court to the full Court),¹ and unless the case be of a very special character, it will be useless, as has been seen, to apply to the Privy Council for special leave to appeal.

Moreover, in the future it will be competent for the Federal Parliament to entirely oust the jurisdiction of the Supreme Court of a State in all such cases by declaring that the jurisdiction of the High Court shall be exclusive.

Cross Appeals.—S. 74 of the Act is open to another objection urged against the original clause—*viz.* that where a case is brought in the Supreme Court of a State, if neither party is satisfied with the decision of that Court, there may be cross appeals, one by one party to the High Court, and the other by the other party to the Privy Council.

Canadian Appeals.—With regard to the latter objection, and also to the objection that to the unsuccessful party is given the option of selecting the appellate tribunal, it may be observed that the same objections apply to the law now regulating appeals from Canada. There, too, the successful party in the Provincial Court has been deprived of the right which he formerly possessed of retaining the benefit of a judgment in his favour unless it were reversed by the Privy Council; there the option of selecting the appellate tribunal lies with the defeated litigant; and there, too, cross appeals may be brought by one party to the Supreme Court of Canada, and by the other party to the Privy Council.²

This arrangement, although now extended to Australia, seems to fall considerably short of ideal excellence, and would appear not easy to defend on principle.

With regard to Canada it has been said :

This double appeal, which exists as a matter of statutory right, may seem an anomaly, but in practice no difficulty has resulted from it. The statement that the judgment of the Supreme Court of Canada is final is subject to some qualification. . . . An appeal may be allowed to the Privy Council from the judgment of the Supreme Court of Canada . . . and in fact many such appeals have been allowed, not as a matter of statutory right, but of grace. The exercise of

¹ See s. 73 (1), *ante*, p. 164.

² In *The City of Montreal v. Devlin* [1878], 22 Lower Canada Jurist 136, the Court of Queen's Bench at Montreal decided that leave to appeal to the Privy Council from a judgment of the Court of Queen's Bench, Quebec, must be granted upon the application of one party to the suit, notwithstanding that the adverse party had previously obtained leave on application to another Judge in Chambers to appeal from the same judgment to the Supreme Court of Canada. Whatever might be the inconveniences resulting from the allowing in the same case of a double appeal to two separate tribunals, whose decisions are each held by law to be supreme and final, the Court could not refuse to grant the appeal to the Privy Council, being equally bound so to do by the precise text of the law, as was the Judge in Chambers to allow the appeal sought for to the Supreme Court. In this particular case, however, the parties to the suit finally came to a compromise, so that neither appeal was prosecuted.—Todd's *Parliamentary Government in the British Colonies*, 2nd ed. (1894), pp. 309-10.

the prerogative in this direction would therefore prevent any evil which might be threatened from conflicting judgments. Further, it may reasonably be assumed that in the event of concurrent appeals being taken, the Supreme Court would withhold its decision pending the result of the appeal to the Privy Council.¹

It appears, then, that the law which will in future regulate appeals from the Supreme Courts of the federated States and from the High Court of Australia bears a very close resemblance to that which regulates appeals from the Provincial Courts and from the Supreme Court of Canada. The appealable amount in the case of several of the provinces is, however, smaller than in the case of the Australian States,² and there is no legislative restriction on the prerogative right of the Queen to grant special leave to appeal from any decision of the Supreme Court of Canada.³ By a Dominion Act of 1891, important questions of law or fact touching, among other matters, provincial legislation, or "the constitutionality of any legislation of the Parliament of Canada," may be referred by the Governor in Council to the Supreme Court for hearing or consideration; and it is expressly provided that "the opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to Her Majesty in Council, be treated as a final judgment of the said Court between parties."⁴

Summary of Differences.—The main points of difference which have now been discussed may be summarised as follows:

1. Under the law hitherto prevailing in the Australian colonies, a litigant in any action involving more than £500 had a right to appeal to the Privy Council from any final judgment, decree, or order of the Supreme Court, subject to his applying to the Supreme Court within fourteen days, and to his giving security for due prosecution of the appeal and payment of costs if awarded. In other respects, it was an absolute right to appeal of which he could not be deprived. Special leave to appeal might be granted by the Privy Council in cases where less than £500 was involved.⁵

2. Under the Bill as transmitted to England, a litigant in an action in the Supreme Court involving more than £500 would, it seems, have had the option of appealing either to the High Court or to the Privy Council direct; and if neither party were satisfied, one might appeal to the High Court and the other to the Privy Council direct. If the only appeal made were to the High Court, the decision of the High Court was to be "final and conclusive," and neither party could then appeal

¹ Memorandum from Mr. R. Cassels, Registrar of the Supreme Court of Canada, cited in Mr. Todd's work, *ibid.*, p. 310.

² In five out of the eight provinces an appeal to the Privy Council lies in cases involving more than £300, in two others £500, and in Ontario \$4,000. See the Table of Conditions of Appeal to the Privy Council contributed by Mr. A. Wood Renton to this Journal, N.S., Vol. I., pp. 360-62.

³ Such right is expressly saved (*Rev. Stat. Can.*, 1886, No. 135, s. 71).

⁴ 54 & 55 Vict., c. 25 (Can.), s. 4.

⁵ Cf. *Sun Fire Office v. Hart* [1889] 14 App. Cas. 98.

from such decision to the Privy Council as a matter of right. Either party might, however, except in cases prohibited by Clause 74, apply to the Privy Council for special leave to appeal, and if the case belonged to the limited class of cases referred to in *Prince v. Gagnon*, such leave might be granted. But by Clause 74 no appeal was to be permitted "in any matter involving the interpretation of this Constitution or of the Constitution of a State unless the public interests of some part of, Her Majesty's dominions, other than the Commonwealth or a State, are involved." Whether this latter prohibition would have been limited to appeals from the High Court, or would have also extended to appeals from the Supreme Court of a State, was left in doubt.

3. Under the Act as passed, a litigant in such an action will have the option of appealing to the High Court or to the Privy Council direct; and if neither party be satisfied, one may appeal to the High Court and the other to the Privy Council direct. If the only appeal made be to the High Court, the decision of the High Court will be "final and conclusive," and no appeal will lie from the decision of that Court as of right. Either party may, however, except in cases prohibited by s. 74, apply to the Privy Council for special leave to appeal, and if the case belongs to the limited class of cases referred to in *Prince v. Gagnon*, such leave may be granted, although less than £500 may be involved. But by s. 74 no appeal shall be permitted from a decision of the High Court upon any question "as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court," upon being "satisfied that for any special reason the certificate should be granted," "shall certify that the question is one which ought to be determined by Her Majesty in Council."

4. In Canada, as in Australia, a litigant has the option of appealing, in a case involving an appealable amount, from the Provincial Court to the Supreme Court of Canada or to the Privy Council direct; and if neither party be satisfied, one may appeal to the Supreme Court and the other to the Privy Council direct. If the only appeal made be to the Supreme Court of Canada, the judgment of that Court shall be "final and conclusive";¹ but either party may apply to the Privy Council for special leave to appeal, which will be granted only in the class of case already referred to.

NOTE.—The Draft Federation Bill transmitted to England by the five federating colonies, which is printed in this volume of the Journal, was, after various amendments made by the Government, introduced in the House of Commons on May 14, 1900, and after further amendment was read a third time on June 25. It was brought into the House of Lords on June 26, and

¹ *Rev. Stat. Can.*, 1886, c. 135, s. 71.

without further amendment passed its third reading on July 5, and received the Royal Assent on July 9.

The amendments made in the Bill, as printed *ante*, pp. 151-72, are as follows:

Page 151. Title: *omit* "Draft of a Bill" *and insert* "An Act."

[9th July, 1900] Preamble, line 1: *after* "people of" *insert* "New South Wales, Victoria, South Australia, Queensland, and Tasmania."

Clause ii., line 1: *omit* "This Act shall bind the Crown, and its provisions" *and insert* "The provisions of this Act."

Page 152. Clause iii., line 3: *after*, "people of" *insert* "New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia."

Clause vi., line 3: *omit* "'Colony' shall mean any colony or province."

Page 164. Clause lxxiv.: *omit the whole clause as printed, and insert* "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question howsoever arising as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

"The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

"Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

COMPARATIVE LEGISLATION IN BANKRUPTCY.¹

[Contributed by PROFESSOR RICHARD BROWN.]

ON a former occasion, when privileged to address a Glasgow audience, I traced the historical development of the bankruptcy laws of England and Scotland. I now propose to examine the bankruptcy laws of our own and other countries as they presently exist, so that by comparison we may lay a foundation for an estimate of their relative merits and defects.

"Bankruptcy": Traders and Non-traders.—I use the word "bankruptcy" in its generic sense as including insolvency in every form, but it is well to remember the great diversity in the use of the term. Literally, "bankrupt" means a ruined trader—one whose table or counter of business is broken up (*banco rotto*)—and, in the earlier systems of law, the advantages and disadvantages of bankruptcy proceedings were confined to such persons. Thus, in England no notice was taken by the Legislature of the insolvent who was not a trader. He was left to be dealt with by the Common Law, and especially the Law of Imprisonment for Debt, until humanity intervened in the interests of the unfortunate. Hence arose a double system—that of bankruptcy, applicable to traders, and that of insolvency, embracing all outside the mercantile pale. Each had its separate court and officials until the two were merged, in 1861. Even after that date, the distinction, in a minor form, was kept up, until it was finally and completely abolished by the existing English Act of 1883.

Scotland derived much of its Common Law of debtor and creditor from France, where the distinction between trader and non-trader was always well marked, and still exists. But the statutory laws of insolvency in Scotland and France were, after some early superficial resemblance, developed on different lines. The Scottish Statutes of 1621 and 1696, with which we are familiar, were directed equally against insolvents and bankrupts. In both Acts "dyvour" and "bankrupt" are used as interchangeable terms, and there is no trace of any special treatment in respect of the debtor's occupation. Dyvour and bankrupt had equally the benefit of the Common Law of *Cessio Bonorum*, which was almost identical with that of France. The first statutory law of distribution or sequestration in Scotland was that

¹ An address delivered before the Glasgow Chartered Accountants' Students' Society.

of 1772, and, like the older Acts mentioned, it was not confined to traders. Shortly afterwards, however, the influence of the English system became manifest. The Sequestration Act of 1783 was confined to traders, and the non-trader continued subject to imprisonment, modified only by the Common Law of *Cessio Bonorum*. Subsequent Acts contained elaborate definitions of "mercantile persons" to whom the Act should apply. S. 5 of the Act of 1839 follows the English model of the time, in attempting a complete enumeration of the trading community. No less than twenty-seven trades are specially mentioned as coming within the operation of the Act. All this was abolished by our existing Statute of 1856, so that Scotland was, in this particular, in advance of England by nearly thirty years.

France, and nearly every country on the Continent of Europe, except Germany, still retain the distinction between trader and non-trader. The German Bankruptcy Code of 1877 discriminates between fraudulent bankruptcy and simple failure, but the non-trader may be included in either class. The United States had not, until last year, any general law of bankruptcy, each State being left to deal with the matter for itself; but the Act of Congress of 1898 applies to all classes. On the other hand, the Parliament of Canada, in exercising in 1875 the power reserved to it by the Dominion Constitution of making bankruptcy laws, took for its model one of the older English Acts, and enumerated no less than thirty-seven kinds of traders. This species of legislation, however, was not appreciated, and in 1880 the whole Act was swept out of existence, and now, as formerly, each province deals with debtors according to the discretion of the local Parliament. The Australasian Colonies are not yet consolidated, but nearly all have bankruptcy Statutes on modern English lines and applicable to all persons. It may be noted that, though the abortive Canadian Statute dealt only with traders, it was called "An Act respecting Insolvency." With greater consistency, the majority of the Australasian Statutes are titled "Insolvency" Acts, and the word is defined to include bankruptcy. The exceptions are New South Wales and Tasmania, but in each case "bankruptcy" is defined to include insolvency where used in any other Statute in force.

Within the limits of a single lecture, my remarks on this wide subject must be of a very general character. The method of treatment which suggests itself is first to find out what a bankruptcy law ought to be, and then to explain the leading systems, that we may judge how far each corresponds with our ideal.

The Objects of Bankruptcy.—Bankruptcy may have for its object (1) the punishment of the fraudulent debtor; (2) the reinstatement of the unfortunate but innocent debtor; or (3) the equitable distribution of the insufficient assets among all the creditors. All of these objects may be combined in one system, yet the relative importance given to each may determine the class and character of the legislation.

(i) *Salus Reipublicæ*.—The punishment of the fraudulent debtor very properly commends itself to public attention, but what is the object in view, and in whose interest is the punishment inflicted? The object is clearly the moral health of the community—the comfort and prosperity of the whole people. Every civilised country punishes fraud, and has established at public cost a judiciary and a criminal organisation for the punishment of this and other crimes. The object is not to recompense the sufferer—far less is it the gratification of the vindictive feelings of the person or persons injured. It is the prevention of future crimes by the same person, and, more particularly, the prevention of similar crimes by others, who may be deterred from criminal acts by the certainty of subsequent punishment. It is a *public* advantage, and it is therefore manifestly unjust that any section of the public should defray the whole cost. Creditors who have already lost money through the fraud of their debtor, and who, being warned, are less likely than others to be again sufferers from the same cause, receive no special benefit from the judicial process, and should not be asked to pay any larger proportion of the cost of conviction and punishment than their neighbours who have not suffered from this particular criminal act. Yet this is the effect in every case where punishment of the debtor is made to form part of a bankruptcy system, and where the already insufficient assets are further diminished by expenditure in the public interest. We may therefore set aside the view that punishment of the bankrupt can justly be included among the objects of a bankruptcy law.

(ii) *Rehabilitation of Debtor*.—We now turn to the second branch of our enquiry, and ask whether the release of the debtor from his unfulfilled obligations is of sufficient importance to form a leading feature of a law of bankruptcy. Humanitarian sentiment led, as we have seen, to the Insolvent Code of England. Thus the Preamble of the Insolvent Debtors Act of 1772 (12 Geo. III., No. 23) recites that “many persons, by losses and other misfortunes, are rendered incapable of paying their whole debts, and though they are willing to make the utmost satisfaction they can, and many of them are able to serve his Majesty by sea or land, yet are detained in prison by their creditors, or have been forced to go into foreign parts, and such unhappy debtors have always been deemed the proper objects of public compassion.” There is here set forth a *public* feeling antagonistic to the rights derived from obligation, and a *public* loss through the debtor being unable to serve in the army or navy. Similar sentiments are to be found in the messages to Congress of the American presidents. The Constitution of the United States reserved to Congress the power to make general bankruptcy laws superseding the State laws; but, as we shall see, this constitutional right was only spasmodically exercised, and only for very short periods. In the absence of any national Code of Bankruptcy, the chaotic character of the State laws was frequently commented on by successive presidents. Thus in 1825 President Adams wrote: “To conciliate the

claim of the individual citizen to the enjoyment of personal liberty with the effective obligations of private contracts is the difficult problem to be solved by a law of bankruptcy. These are objects of the deepest interest to society, affecting all that is precious in the existence of multitudes of persons, many of them in the classes essentially dependent and helpless."¹ I took occasion, in a lecture delivered in June of last year,² to sketch the history of the Law of Debtor and Creditor, and to show that the Common Law of *Cessio Bonorum* in Rome and France and Scotland mitigated to a large extent the evils of imprisonment for debt complained of in the legal history of England and America. But imprisonment for debt, where unaccompanied by fraud or some statutory offence of a similar nature, is now almost universally abolished. The State of New York led the way in 1831, and before 1844 at least eighteen separate States had followed the example. The rule is now universal throughout the United States. France abolished imprisonment (except for special offences) in 1867, England in 1869, Belgium in 1871, Ireland in 1872, Norway and Switzerland in 1874, Italy and Sweden in 1877, Russia in 1879, and Scotland in 1880. Imprisonment for debt is also abolished in all the provinces of Canada and in all the colonies of Australia. Germany still retains imprisonment, but it is limited to six months, and the debtor is set at liberty on his making a declaratory oath.³ I have mentioned these facts to show that arguments for a bankruptcy law, founded on public sympathy and upon the loss of the services of the debtor to his family and to the State, can no longer be maintained. But in certain quarters, especially in America, it is urged that a bankruptcy or insolvency law should have for one of its main objects the reinstatement of the debtor in the full rights of citizenship, untrammelled by the burden of debt. Bankruptcy, it is urged, relates as much to the *status* of the individual as to the distribution of his estate. "The contractual relation in which a debtor stands towards his creditors is a part of his *status*," and the courts of the country of a debtor's domicile should have power to alter or restore this *status* on grounds of public policy, irrespective of any supposed rights of creditors.⁴ It will serve no purpose to criticise this view, for it is obvious that no system of bankruptcy is required for the mere purpose of dissolving the legal obligation of a debtor to his creditors. The English Insolvency Acts, when they existed, were no doubt provided as a substitute for the power of unlimited imprisonment; but their elaborate provisions were directed towards preserving the legitimate interests of the creditors, and towards distributing the assets equitably among them.

(iii) *Equitable Distribution of Assets*.—We are thus brought by a process of exhaustion to the third, and, since the abolition of imprisonment for debt, the only real object to be served by a bankruptcy statute. At Common Law, and apart from Statute, there is necessarily a race among creditors to obtain

¹ *Presidents' Messages*, vol. ii., p. 303.

² Code of Civil Procedure, Art. 782, *et seq.*

³ See *Scottish Accountant*, vol. iii., p. 27.

⁴ See *Harvard Law Review*, vol. vi., p. 360.

payment in full out of assets insufficient to pay every one his just proportion. There is also a danger that the bankrupt may voluntarily convey these assets to friends, and so put them beyond his creditors' reach, or that he may voluntarily favour certain creditors at the expense of the general body. The object, therefore, is to preserve the estate, such as it is, and to distribute it among the creditors in proportion to their several rights. "From the moment of failure," says Professor Bell, "the inadequate fund becomes the common property of the creditors," and "this forms the groundwork of all the peculiarities to be found in the bankrupt law."¹ "What is the object of a bankruptcy law?" asks the Attorney-General of England in introducing the English Bill of 1869. "The object," he answers, is "to collect the proceeds of the estates of bankrupts, and to distribute them among the creditors as fairly, cheaply, and speedily as possible."²

The United Kingdom: England.—In endeavouring to ascertain how far existing bankruptcy laws conform to these principles, I naturally take first the various sections of the United Kingdom; but as I have elsewhere³ dealt fully with the bankruptcy systems of England and Scotland, a brief recapitulation must suffice. I may remind you that English bankruptcy has always been cumbrous and extremely expensive. Lord Eldon said of it in 1801 that "there was no mercy to the estate; nothing was less thought of than the object of the commission; as the statutory proceedings were frequently conducted they were little more than stock-in-trade for the commissioners, the assignees, and the solicitor."⁴ In 1831 Lord Brougham introduced what was supposed to be a great reform, but after thirty years' experience it was described in the House of Commons as "an utter and disgraceful failure."⁵ The salaries and allowances of the judges, the commissioners, the official assignees, and the messengers, amounted in 1859 to upwards of £82,000, all which was paid by the creditors. In 1861 another change was made, in which it was attempted to get rid of some of the officialism, and to introduce parts of the Scottish system, which the Attorney-General admitted had "worked extremely well."⁶ The new Act, however, was scarcely an improvement. Its subsequent career justified the criticism of Mr. Bovill in the course of the debate that "it touched upon almost every point of the bankruptcy law, and introduced amendments upon almost every one, yet practically and substantially it left the old law in force."⁷ In 1869 a more drastic change took place in the Consolidation Act of that year. The Government of the day were urged to give the Scottish system a trial in a more complete form, and they accordingly attempted to do so, and thought they had succeeded. The Attorney-General said that "the great merit of the Scotch system was its simplicity; the absence of officialism;

¹ Com., i. 8.

² *Hansard*, vol. cxciv., p. 777.

³ See *Scottish Accountant*, vol. ii., p. 135.

⁴ 6 Ves. 1.

⁵ *Hansard*, vol. clxi., p. 420.

⁶ *Ibid.*, vol. clvii., p. 660.

⁷ *Ibid.*, vol. clxi., p. 421.

allowing the creditors to administer the estates in bankruptcy by themselves and in their own way without interference, and with only the necessary supervision of the Court and the separation of the administrative and judicial functions."¹ But the new Act only bore a superficial resemblance to the Scottish system. Bankruptcy was still loaded with pensions and compensations, generous salaries, and enormous law costs, all of which were paid out of the creditors' money. A specific majority of the creditors might now by a side channel, outside of bankruptcy, secure the whole management to themselves, and the comparative cheapness of this process of liquidation naturally led to its being greatly favoured at the expense of bankruptcy. The loss of the fees to bankruptcy nearly led to the bankruptcy of the whole system. Moreover, the liquidation proceedings trampled on the rights of minorities and offered a door to abuses and fraud. A friendly, and perhaps collusive, majority of creditors could whitewash an insolvent and re-establish him in business without any public enquiry, and without regard to the reasonableness of the arrangement. After a trial of fourteen years the system was condemned, and the whole bankruptcy law of England was again subjected to radical change. The existing Act of 1883, introduced by Mr. Chamberlain, was a return to extreme officialism. In introducing the Bill Mr. Chamberlain stated the two leading objects of bankruptcy to be (*first*) the improvement of the tone of commercial morality and the promotion of honest trading, and (*second*) "the fair and speedy distribution of the assets among the creditors whose property they are." The order of sequence is Mr. Chamberlain's own. "Prevention," he said, "is better than cure. The duty of Parliament is not only to protect the salvage, but also to diminish the number of wrecks."² This argument is glaringly opposed to the construction I have put upon the true objects of a bankruptcy system. As I have elsewhere said, Mr. Chamberlain's Act "is a Public Health Act, but it differs from all other such Acts in respect that the expense of purification is charged neither to the wrongdoer nor to the public, but to a section of innocent sufferers."³ The expense to the creditors still continues great. From the Judicial Statistics, I estimate the average cost of a bankruptcy in England to be about 32 per cent. of the realised assets, as against 12 per cent. in Scotland.

Scotland.—Bankruptcy in Scotland has had a very different history. In the form of a system for the preservation and distribution of assets it had no existence before 1772, but the subsequent development was by way of evolution, not of violent transition. The words of Bell in 1826 form a complete justification of the temporary nature of the early bankruptcy Acts. They were experimental Statutes. "Instead of attempting at once to form a complete system, the process," says Bell, "has been slow and gradual, no improvement having been adopted till the course of experience naturally

¹ *Hansard*, vol. cxciv., p. 777

² *Scottish Accountant*, vol. ii., p. 244.

³ *Ibid.*, vol. cclxxvii., p. 817.

led to it."¹ An eminent American writer says of the Scottish system that it has "attained great excellence by a slow and gradual course of improvement, suggested in the course of practice, and with the aid of combined wisdom of lawyers of profound knowledge and merchants of large views and great experience."² Among the lawyers of profound knowledge who early in its history devoted themselves to this subject, Bell himself has a foremost place. He drafted a complete Code of Bankruptcy, which, although only partially adopted in the Act of 1839 (2 & 3 Vict., No. 41), still forms a mine of sound principle from which much useful matter has since been extracted, and which is by no means yet exhausted. It may interest you to know that on one occasion the Scottish bankruptcy system ran great risk of being absorbed in that of England. The undoubted advantage, other things being equal, of a uniform system of bankruptcy throughout the British Isles, led in 1852 to the formation of a London committee of merchants, who employed English lawyers to draft a Bill professing to extract the best features of both systems. It was submitted to Lord Brougham, who was still enamoured of his legislative achievement of twenty years before, and who readily undertook its promotion in Parliament. The committee employed a special emissary—a Mr. Gilmour—to come down to Scotland to persuade our merchants and lawyers and accountants that the new production was perfect. Fortunately the Scottish public realised in time that it was a reproduction of English official bankruptcy in its worst form. Petitions poured into Parliament from all the leading professional and mercantile bodies in Scotland pointing out the disastrous consequences of allowing the Bill to pass into law. Lord Brougham refused to recognise these as of any weight, and in the session of 1854 pressed his Bill with the vehemence of a violent partisan. The merchants, he said, were misled by interested lawyers and accountants. "An accountant," he said, "meant a man who could give no other account of himself."³ He snarled at the suggestions of the Lord Chancellor and others, that in face of the opposition he should withdraw his Bill, but on a subsequent occasion he yielded to the extent of taking time to consider. Consideration, and perhaps outside pressure, had their effect, and the Bill was allowed to die a natural death. I may remind you that Lord Brougham's Act of 1831, which it was practically proposed to extend to Scotland, was a gigantic structure of officialism. It included a special Court of Review, the Chief Judge of which had £3000 per annum, the other judges £2000 each, and the commissioners £1500 each. It had also a host of official assignees, and a numerous staff of registrars, accountants, taxing-masters, messengers, clerks, and other officers, all specially attached to the Bankruptcy Court. On the other hand, it is one of the distinguishing features of Scottish bankruptcy that it has no special bankruptcy officials. The ordinary Courts

¹ Bell's Com., i. 17.

² Hansard, vol. cxxxii., p. 1394.

³ Kent's Com., 14th ed., ii. 393, *note*.

and officers efficiently undertake all the routine work. For a time we had an "Accountant in Bankruptcy" to supervise and control the trustees appointed by the creditors, but in 1889 it was found that even this office could, without any loss of efficiency, be combined with that of "Accountant of the Court of Session" (52 & 53 Vict., No. 39).

I have been led to show the bright side of Scottish bankruptcy because in some important respects it stands out clearly against the shadows of a neighbouring system. But it is not by any means perfect. In the first place, it wants consolidation, so as to embrace in one Act the whole law of insolvency, including reduction of preferences and the avoiding of gratuitous alienations. It should also embrace within itself a provision for small bankruptcies, as in the English system. At present an attempt is made to meet this requirement by an adaptation of the now antiquated process of *Cessio Bonorum*, but this process was instituted for an entirely different purpose, and the old framework distorts the new structure. *Cessio Bonorum* was, as we have seen, a refuge from arbitrary imprisonment, and therefore the debtor himself was invariably the petitioner. In 1880 the abolition of imprisonment for debt took away the only motive the debtor had for prosecuting the action, but, as part of the new system, he was in 1881 presented with another motive in the shape of a possible discharge. Voluntary bankruptcy in this form is therefore still occasionally resorted to, but in the great majority of cases modern *Cessio* is in effect the creation by creditors of an involuntary bankruptcy for the purpose of distributing the debtor's estate. When it takes this form, the initial examination of the debtor is altogether out of place. A public examination, as in sequestration, may be expedient, but in *Cessio* it is taken at the wrong time. To prove from the debtor's lips that he had been guilty of concealment or extravagance may be a good reason for denying him the benefit where he is himself the applicant, but it is no reason for refusing the petition of his creditors. There are, however, graver objections to *Cessio* as a process for small bankruptcies, such as the imperfect vesting of the trustee, the exclusion of *acquirenda*, the absence of retro-active nullities of preferences, and the want of international recognition of either decree or discharge.

Ireland.—Bankruptcy in Ireland has run a course separate from, but analogous to, that of England. The leading Act is that of 1857 (20 & 21 Vict., No. 60), at which date, it will be remembered, Lord Brougham's Act of 1831 was still in force in England. The Irish Act, like that of England, combined the previously existing Courts of Bankruptcy and Insolvency in a new Court of Bankruptcy and Insolvency, with two judges, each of whom was to receive £2000 per annum. It also provided for the usual array of registrars, official assignees, creditors' assignees, clerks, and messengers. In addition to the salaries of permanent officials, it was the duty of the Court to fix the remuneration of the official assignees, messengers, etc.; and it may be noted that even the messenger might be remunerated to the extent

of $2\frac{1}{2}$ per cent. of the assets placed under his particular charge (s. 76). Very extensive changes were made by the amending Act of 1872 (35 & 36 Vict., No. 58) on the lines of the English Act of 1869, which is practically the ruling Act in Ireland at the present day. All the defects of the English Acts already pointed out are reproduced in Ireland; but recent statutory alterations have been on the right lines—*e.g.*, the establishment of local Bankruptcy Courts in 1888 (51 & 52 Vict., No. 44) and the union and consolidation of the Bankruptcy Court with the Irish Supreme Court in 1897 (60 & 61 Vict., No. 66). I have endeavoured to form an estimate from the Judicial Statistics of the average cost of bankruptcy in Ireland at the present day, with the result that Bankruptcy consumes 46 per cent. of the realised assets, Insolvency 33 per cent., and Vesting Arrangement 32 per cent. These figures are in excess of those of England, which, so far as I can discover, is, with this exception, the most expensive bankruptcy system in the world.

Dominion of Canada.—From the United Kingdom I pass in natural transition to the British Colonies, in all of which the bankruptcy law of England, in one or other of its varying forms, has served as a model. It has already been incidentally mentioned that in the Dominion of Canada there is at present no general law of bankruptcy. We may, however, glance at the provisions of the Act of the Dominion Parliament passed in 1875 and repealed in 1880. It applied, as we have seen, only to traders, trading partnerships, and trading companies. The assets were vested in the official assignee of the county or district of the debtor's domicile. The creditors might supersede the official assignee by an assignee appointed by themselves, and in this case the Court fixed the remuneration of the official assignee for his services up till the period of the creditors' appointment. The creditors had only one vote each according to number, no regard being paid to value. A discharge of the bankrupt might be voted by a majority in number and three-fourths in value of the creditors for \$100, but, where the dividend was less than 33 per cent., the Court might refuse to sanction. The remuneration of the assignee, whether official or voluntary, was not to exceed the following scale—*viz.*, 5 per cent. where the realised assets did not exceed \$1000, $2\frac{1}{2}$ per cent. on the amount between \$1000 and \$5000, and $1\frac{1}{4}$ per cent. on the amount in excess of \$5000. Those rates do not seem excessive, but the costs might be considerably increased by the fees of attorney and counsel where these were employed. The non-success of the Act may to some extent be accounted for by the diversity of the previously existing provincial systems, embracing such contrasts as the English law of Ontario and the French Code which ruled at least part of Quebec. These provincial laws are again in force. In Quebec, as might be expected, the law is based on *Cessio Bonorum*, but a creditor holding an unsecured claim of \$200 and upwards can require a trader to make an abandonment. A curator is then appointed by the Superior Court

to administer the estate, but there is no provision for the discharge of the insolvent. In Ontario the debtor may make an assignment to the sheriff of the county in which he resides or carries on business; or, with the consent of a majority of his creditors having claims of \$100 or upwards, he may make an assignment to any other person resident in Ontario. Provision is made for a *pro-rata* distribution among the creditors. The mode in which the creditors vote resembles that with which we are familiar in company law. Thus, for a claim between \$100 and \$200 the creditor has one vote; between \$200 and \$500, two votes; between \$500 and \$1,000, three votes; and for every \$1,000 beyond, an additional vote.

Victoria.—We now cross the globe to the Australasian Colonies, nearly all of which have elaborate codes of bankruptcy practically embodying the English system. The colony of Victoria revised, repealed, and re-passed all its leading Statutes in 1890, so that the principal Act now in force is called the "Insolvency Act, 1890." This, however, is mainly a reproduction of the Insolvency Act, 1871, which, in turn, is the English Act of 1869 with adaptations and improvements. In some cases the terminology is different. "Bankruptcy" becomes "insolvency," the Scottish word "sequestration" takes the place of "adjudication," and the words "voluntary" and "compulsory" are used to distinguish between petitions presented by the debtor himself and those at the instance of creditors. If a creditors' trustee supersedes the official assignee, the latter is to receive, as remuneration for his temporary services, the sum of £5 if the gross assets do not exceed £200, and £10 where they exceed that sum. If the official assignee continues in office, he is to receive such remuneration as the creditors decide; or failing such decision, as the Court may award, not exceeding 5 per cent. on the gross assets. The creditors' trustee accepts office on the same terms. This of course does not include Court dues or solicitors' charges, and, if we are to judge by the very full schedule of fees and costs appended to the Act, these are quite equal to similar dues and charges in England. In Victoria there is a separate Court of Insolvency and a separate judge; but all judges of County Courts are also judges of the Court of Insolvency, and may preside at a Court in their own district. In 1897 Victoria found itself behind the age in adhering to a repealed English Act, and accordingly, by an amending Act of that year (61 Vict., No. 1513), numerous provisions were taken from the English Acts of 1883 and 1890. More extensive duties by way of inquisition and examination were imposed on the officials, and the creditors are now called upon, as in England, to attend, at their own charges, to the moral health of the mercantile community.

New South Wales.—In New South Wales, which is the only other colony to which I need refer, the course of bankruptcy legislation has been similar to that of Victoria. The principal Act was passed in 1887, at which date the Legislature had the benefit of the existing English Act.

In 1898, however, the Act of 1887 was revised by the commissioner for the consolidation of the Statute Law, and was repealed and re-enacted with a few alterations, chiefly verbal. The existing Statute is therefore the "Bankruptcy Act, 1898" (62 Vict., No. 25). Its general scope is more in accordance with the English Act of 1869 than with Mr. Chamberlain's Act, but it obviates the most serious defect of its model by providing for the protection of minorities. If creditors appoint a trustee, they fix his remuneration, which must be of the nature of a commission or percentage. If one-fourth in number or value of the creditors dissent, or if the bankrupt satisfies the Court that the remuneration is unnecessarily large, the Court fixes the remuneration (s. 82). If no remuneration has been voted, the trustee is allowed such proper costs and expenses as the registrar may allow (s. 83). Where the creditors have not appointed a trustee, the official assignee is remunerated at the rate of 5 per cent., of which one-half is calculated on the gross amount of the estate, and the other half on the dividends when declared. The creditors may, however, resolve to allow a larger amount, subject to the special power of appeal already referred to. The charges of solicitors and others are to be taxed by the registrar or taxing-master, and, as in Victoria, there is appended to the Act a scale of Court fees.

The United States: the New Act.—The United States of America, as already stated, has now a national law of bankruptcy; but as it only took effect on July 1, 1898, it is too soon to judge of its merits from the standpoint of experience. Bankruptcy legislation in America has had a singular history. By the constitution, Congress had the power specially reserved to it of framing national laws on the subject. This power was first exercised in 1800, but though the Act was to remain in force for five years it was repealed by an almost unanimous vote in 1803. After the commercial panic in 1837 another national law was passed, but it was repealed in less than thirteen months. The financial disasters attending the Civil War led to another enactment in 1867, which withstood opposition till 1878. There has therefore not been more than fifteen or sixteen years of a national law during the whole century. The present Act has been more deliberately and carefully framed than any of its predecessors. In some form or other it has been before Congress for many years, and it gives some indication of the widespread feeling among the mercantile community of the necessity for such a measure to supersede the diverse and irreconcilable State laws, that in the year preceding the Act no less than eleven separate Bills on the subject were laid before Congress. The Act, practically as it now stands, was passed by the Senate so far back as 1884, and at length, on February 19th, 1898, it passed the House of Representatives by 159 to 125 votes.

The Scheme of the Act Sketched.—It is impossible to give more than a few of its leading features. The distinction between voluntary and

involuntary bankruptcy is very marked. Any person (not a corporation) may file a voluntary petition in insolvency so as to obtain for himself the benefits of the Act, but involuntary proceedings can only be taken against corporations or against debtors owing \$1,000 or over, except wage-earners or persons engaged in farming or tilling the soil (s. 4). Wage-earners are defined as individuals who work "for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 per year" (s. 1). Three creditors, having in the aggregate claims amounting to \$500, or if the whole creditors are less than twelve, then one creditor having a claim of that amount, may file a petition (s. 59). The Act defines as "Acts of Bankruptcy" any fraudulent conveyance or preference, the granting of an assignment for creditors, and a written admission of inability to pay debts and of willingness to be adjudged a bankrupt (s. 3). An involuntary petition must be preceded by an act of bankruptcy, and must be filed within four months of such act. It is a complete defence to prove that, at the date of filing the petition, the person was not insolvent. Insolvency is defined in the absolute, not in the practical sense—that is to say, a person is insolvent where the aggregate of his property, at a fair valuation, is insufficient to pay his debts (s. 1), but he is not necessarily insolvent merely because his realised assets are insufficient to meet his liabilities.

The administration of the Law of Bankruptcy is entrusted to the ordinary district Courts of the United States and Territories, which for this purpose are called Courts of Bankruptcy (s. 1). Each Court is bound to appoint officers called referees, in such numbers as may be necessary to assist in expeditiously transacting bankruptcy business within the jurisdiction. Each referee is appointed for two years, but he may be removed if the Court think his services are not needed, or for any other cause. These referees consider petitions referred to them by the clerks of Court, administer oaths, and examine witnesses. In the absence of the judge, or in the event of his sickness, the referees exercise the power of taking possession of, and releasing, the bankrupt's property. They may also perform such other judicial duties as may be devolved on them by rules or orders of Court, except where the question relates to an application by the bankrupt for a composition or a discharge (s. 38). Referees also declare dividends, and prepare and deliver to the trustee dividend-sheets showing the dividends declared and to whom payable. They have also a large number of other specified duties connected with the administration (s. 39).

The creditors at their first meeting, by a majority vote in number and value, appoint either one or three trustees. If they fail to do so, the Court makes the appointment (s. 44). When three trustees are appointed, the concurrence of at least two of them is necessary for every act. The trustee collects and reduces to money the property of the estate, disburses money by cheque or draft, makes up detailed statements of the administration, and pays dividends within ten days after these are declared by the referee. He

also, within the first month after his appointment and every two months thereafter, reports to the Court in writing the condition of the estate, and the amount of money on hand. Dividends are to be paid as often as the money in the trustee's hands enables him to pay 10 per cent. of the allowed claims (s. 65).

After his judicial examination, the bankrupt may offer a composition to his creditors which may be accepted by a majority in number and value. To be effectual it must be confirmed by the Court after hearing objections. Confirmation only takes place where the judge is satisfied that it is for the best interests of the creditors, and that the bankrupt has not been guilty of any breach of duty or of good faith (s. 12). The effect of a composition is that the legal title to the assets remains, or is re-invested, in the bankrupt. The composition also operates as a discharge (s. 14).

Where there is no composition, the bankrupt may, after the expiration of one month, and within twelve months from the date of the bankruptcy (*i.e.* from the date of the filing of the petition), present an application for discharge. Parties are allowed a reasonable opportunity for being heard, after which the judge grants the discharge unless the bankrupt is shown to have committed a punishable offence.

Fees.—It is alleged that the excessive fees allowed under the national law of 1867 was one of the causes of its repeal, but American lawyers testify that the fees under the present Act are extremely moderate. The petitioner deposits \$25 with the clerk of Court, of which \$10 are paid to the clerk himself, \$10 are kept by the clerk for the referee, and \$5 kept for the trustee, in each case to be paid to them respectively for services after they are rendered (ss. 40, 48, 51). In addition, the referee receives 1 per cent. commission on sums paid as dividends, and $1\frac{1}{2}$ per cent in the case of a composition. The trustee receives, in addition to the \$5, such commission on dividends as may be allowed by the Court, not exceeding 3 per cent. on the first \$5,000 or less; 2 per cent. on the second \$5,000 or part thereof; and 1 per cent. on sums in excess of \$10,000. Where a voluntary bankrupt makes affidavit that he "is without, and cannot obtain the money with which to pay," the initial fees, the bankruptcy may proceed without the deposit (s. 51). The duties of marshal, which resemble those of our sheriff's officer, are remunerated by the usual fees paid for their services. There is also allowed a reasonable fee for one attorney in respect of professional services actually rendered to the petitioner, whether voluntary or involuntary, in connection with the duties specially imposed upon them by the Act (s. 64). Necessary outlays in connection with the preservation of the estate subsequent to filing the petition also form a first charge upon the assets (s. 64).

The American Act seems to have met with general acceptance as a much-required reform. The interminable questions arising out of the effect in one State of a discharge granted in another State are set at rest. It has, however, been objected that the interests of the debtor are protected more

carefully than those of the creditors. "A discharge is granted without regard to the dividends or the lack of them, and without the assent of any part of the creditors. The acts of bankruptcy affording ground for a creditor's petition do not include non-payment of debts, and an insolvent debtor who can refrain from making fraudulent conveyances or giving or allowing preferences may avoid bankruptcy indefinitely."¹

Continental Systems.—With the exception of Scotland, the root-stem of the systems of bankruptcy we have hitherto examined has been that of England, but the continent of Europe presents an entirely different type. The old Common Law of insolvency in France was analogous to that of Scotland; but bankruptcy, as a code or system of procedure, went on entirely different lines. The French Code of 1807 was adopted by almost every other country on the continent of Europe, and in many cases it is still in force with more or less of adaptation to modern circumstances. In France itself the Bankruptcy Code of 1807 was superseded by that of 1838, but the latter does not differ materially, either in principle or in practice, from the older Code. Germany, upon its consolidation into an empire, broke loose to a large extent from the Code Napoléon, and has now a distinct bankruptcy law of its own. A glance, therefore, at the French and German systems must serve to exhaust our present review.

France.—In regard to France, I have to acknowledge my indebtedness to M. Léopold Goirand, a distinguished *avoué* of Paris and the author of a valuable treatise on French Commercial Law. He has not only answered my specific enquiries, but has supplied me with much valuable information on the lines of my special study. As we have seen, the distinction is still retained between trader and non-trader.

(i) *Non-Traders.*—If a person be a non-trader he can only put himself *en déconfiture*, which, since the abolition of imprisonment for debt, means little more than a state of discomfort. This is removed only by a return to solvency, but on the other hand it brings with it no civil disabilities. So long as imprisonment for debt lasted, there was always the debtor's remedy of Cessio Bonorum (*cessions de biens*), but M. Goirand informs me that during twenty-eight years of practice he has never heard of a single case. The process of *cessions de biens* forms the subject of Articles 1265 to 1270 of the French Code of Civil Procedure, but it was a debtor's remedy, and could only be instituted by the debtor himself. As in Scotland, the motive no longer exists, and, differing from Scotland, no other motive has been substituted. Professor Laurent doubts if, since the abolition of imprisonment for debt in 1867, judicial cessio, as distinguished from voluntary cessio, any longer exists.² The Civil Code provided no procedure for distribution of the assets; but we learn from text-writers that, in practice, the creditors formed themselves into a union, and appointed an administrator of the goods

¹ *Harvard Law Review*, xii., p. 272.

² *Principes de Droit Civil Français*, vol. xviii., p. 256.

ceded to them.¹ M. Goirand informs me that under the Code of Civil Procedure² the assets of a civil debtor (non-trader) may be distributed among the creditors; but such distribution does not concern the general assets, but only the particular effects seized. These are distributed *pari passu* amongst all the known creditors, those doing diligence not being permitted to retain more than their share. The process seems to resemble the Scottish equalisation of diligences against a notour bankrupt, under s. 12 of the Bankruptcy Act, 1856.

(ii) *Traders*.—Bankruptcy, as applied to traders in France, is a much more rigorous proceeding. It is divided into three classes: (1) *Faillite*—an insolvency attended with no fraudulent circumstances; (2) *Banqueroute simple*—in which transactions punishable by law are discovered; (3) *Banqueroute frauduleuse*, or criminal bankruptcy. The first involves no punishment, but it subjects the insolvent to many disabilities. He has no political rights, he cannot hold any public office, or sit on a jury, or act as a stockbroker or any broker. He cannot appear on the Bourse, or open an account with the Bank of France. A discharge in bankruptcy, even where accompanied by a *déclaration d'excusabilité*, leaves the balance due to the creditors a debt of honour, the non-payment of which prevents *réhabilitation*, and leaves the debtor under the moral stigma of the disabilities already mentioned. The two forms of *banqueroute* are both punishable. *Banqueroute simple*, which exists where the bankrupt has been guilty of offences such as gambling or speculation, or even extravagant living, is punishable by imprisonment for from one month to two years; and *banqueroute frauduleuse*, as a crime, is punishable by penal servitude for from five to twenty years.

Every trader who suspends payment must file a declaration thereof at the office of the Tribunal of Commerce of his district. He must render an account of his conduct and of the state of his affairs, and if he fail to do so, he may be declared *banqueroute simple*. On this declaration the debtor may be adjudicated bankrupt. Any creditor, no matter what the amount of his claim, or whether it is secured or privileged, may also institute the proceedings by summoning the debtor before the Tribunal and proving the suspension of payment. The Tribunal fixes the date of the bankruptcy, which has no reference to the commencement of the proceedings, but relates back to the day on which the condition of insolvency actually commenced. The effect of the adjudication is to deprive the bankrupt of the right to administer his property from the day on which the bankruptcy is declared to commence. The ownership is not passed, but the right of administration passes from the bankrupt to the syndic. *Acquiescements* also pass to the syndic; but if the bankrupt has contracted new debt in the course of business, the new creditors have a preference over the new assets. The following acts and things are void if done after the date declared for the commencement of the bankruptcy, or within ten days previously thereto: (1) a gratuitous

¹ Laurent, *ut sup.*, p. 244.

² Art. 656, *et seq.*

gift by the bankrupt ; (2) a private or latent contract between the bankrupt and any other person ; (3) a judicial mortgage, which the French law allows to any creditor who holds a judgment against his debtor ; and (4) any payment made by the bankrupt in advance of the due date. To be void, however, a mortgage must be for an antecedent debt, and not a *novum debitum*.

The administration is under the general charge of the Tribunal of Commerce, which, in adjudicating the bankruptcy, appoints one or more provisional syndics. At their first meeting the creditors are consulted as to the appointment of new syndics, after which the Court, without being bound by the views of the creditors, either appoints new syndics or retains those already appointed. In most cases only one syndic is appointed, but the law always speaks of syndics in the plural. The Court also appoints a member of its own body to be *juge-commissaire*, whose duty is to watch over the management, and, where possible, to accelerate the proceedings. He makes orders, which, however, may be appealed against to the Tribunal, and he is bound to report to the Tribunal as to all disputes.

Creditors must lodge their claims, with vouchers, within twenty days after advertisement to that effect ; but if they reside beyond the town in which the Tribunal of Commerce declaring the bankruptcy is situated, they are allowed an additional day for every five *myriamètres* of distance (fully thirty-one miles). Where there is no offence or crime, a composition (*concordat*) may be granted upon the vote of the majority of the creditors and confirmation by the Tribunal. Under a composition, the bankrupt is re-invested, and if he pays the amount he is freed from penalties ; but even then the greater part of the disabilities already mentioned remain, and can only be removed by *réhabilitation*, which involves payment of all his debts in full. In the absence of composition, the bankruptcy proceeds to its natural close, and the insolvent who is not *banqueroute* may obtain a discharge accompanied by a *déclaration d'excusabilité*, although, as we have seen, this declaration has at best only a moral effect.

Judicial Liquidation.—Since 1889 there has also been in France a law of judicial liquidation by which a trader who has stopped payment may avoid the rigorous consequences of bankruptcy, and especially the incapacities and loss of rights which bankruptcy involves. The right is entirely personal to the trader himself. He presents a petition with balance-sheet to the Tribunal of Commerce, together with a list of his creditors. The Court hears the applicant in person, and if satisfied that his claim is well founded it grants his petition and appoints a *juge-commissaire* and provisional trustee. A meeting of creditors is then called by the *juge-commissaire*, who asks their opinion as to the appointment of a permanent liquidator, and of a committee from among themselves. Upon the report of the *juge-commissaire* the Court may appoint as requested. Judicial liquidation is terminated either by a discharge of the debtor on composition, or by a winding-up as in bankruptcy,

or by an actual bankruptcy. A majority in number, and two-thirds in value, of the creditors is required for a discharge.

Cost of Proceedings in France.—As to the cost of bankruptcies and liquidations in France, I have received some valuable information from M. Goirand, which I transcribe as nearly as possible in his own words: "The syndic or trustee of a bankruptcy or of a liquidation delivers his account for the approbation of the Court. The disbursements for legal procedure paid to the *avoués* and to the Bar vary according to the litigation encountered. With regard to the personal fees of the trustee, they depend upon the amount of the realised assets, and upon the dividends distributed, but there is no scale. The Court decides what his remuneration is to be. With regard to this, the Court considers (1) the length of time that the winding-up has lasted, (2) the difficulties that have been met with, and (3) the sums recovered by process against debtors. For instance, in a bankruptcy where 50,000 fr. of assets have been distributed without much litigation or complications, the trustee might be allowed a fee of 2,000 fr. (4 per cent.). If the sum distributed were ten times as much, say 500,000 fr., his honorarium might be fixed at 8,000 fr. (1½ per cent.). In unimportant provincial Courts the proportion of fees is higher than in Paris, because the trustees rarely get important cases, and their remuneration is derived from smaller matters. But the whole question depends upon the appreciation of the Courts. The solicitor who has obtained the adjudication is paid by the creditor who instructed him. His duties cease when adjudication or judicial liquidation is granted. From this moment the trustee acts alone for everything which is not litigation, and where there is such he chooses his own solicitor. In Paris, when there are no assets to pay even expenses, the trustee receives a fixed fee of 50 fr., whatever trouble he takes. The creditors provide the whole of the expenses of a bankruptcy out of the assets; but where there are no assets the State provides 50 fr. in each case for the trustee, who is bound himself to wind-up the estate and to bear any loss incurred thereby beyond such 50 fr. The law is silent as to the kind of person to be chosen as trustee. In the provinces the solicitor who has obtained the adjudication is appointed trustee. In Paris the syndics constitute a corporation, each member of which is appointed by the Court. They each lodge in Court caution-money to the amount of 100,000 fr., and they are jointly and severally liable as a body in case of malversation by one of them. Their number is limited to twenty. They fulfil the duties of liquidator or trustee according to whether it is a case of judicial liquidation or bankruptcy."

The German Code of Bankruptcy.—A few words about bankruptcy in Germany must conclude my review of the various bankruptcy systems.

The German Code of Bankruptcy, to which I have already referred, was passed on February 10, 1877. Before that date the bankruptcy law differed in the several States of the Empire, and was "wholly chaotic." Prussia had, in 1855, passed a bankruptcy law of its own, which served as a model for

the new Code. In Germany, as in France, a distinction is made between failure and bankruptcy, and, as in France, the latter has two forms, punishable with different degrees of severity. Simple bankruptcy is established by extravagance, gambling, dealing in futures, or disorderly book-keeping, and is punishable by imprisonment up to two years. Fraudulent bankruptcy is established by the hiding of property, by fictional debts, by falsifying books, and by the granting of illegal preferences. It is punished by confinement in the penitentiary up to ten years. Either debtor or creditor may present a petition to the *Amtsgericht* or ordinary provincial Court, and where the estate is found insolvent the *Amtsrichter* appoints, if possible from among the creditors, a trustee whose duty it is to wind up the affairs without unreasonable delay. The creditors are called together within one month from the date of the bankruptcy order, and at their meeting they may appoint a committee of their number to advise with the trustee. They may also nominate a new trustee to take the place of the one appointed by the Court, but the Court is not bound to give effect to their nomination. It is the duty of the Court to see that the trustee fulfils his functions, and that his acts are legal. The estates are liquidated with great rapidity. In order that creditors may receive dividends at the earliest moment, it is customary to sell the assets of the insolvent debtor by auction, but all lawful claims remain valid against the debtor until the close of the bankruptcy. The creditors, by a majority in number and three-fourths in value, may accept a composition, but it must have the approval of the Court. The composition re-invests the debtor, but renders him again liable to the ordinary forms of diligence. There are no special provisions in the Code as to costs, but they are said to be very moderate. The trustee is paid out of the Court dues, which do not exceed 2 per cent. of the realised assets. In an ordinary bankruptcy the attorney's fees do not exceed £5. If there are no assets, or if the assets seem to the Court insufficient to pay the expenses, the bankruptcy is not allowed to proceed.

Conclusions from Survey of Systems.—The chief aim of this rapid survey has been to afford material from which each may draw his own conclusion; but I may be permitted a few words by way of comparison. The three leading objects previously described as giving rise to bankruptcy legislation may, for the sake of brevity, be respectively designated punishment, rehabilitation, and distribution. Punishment and rehabilitation are practically opposites, the former representing a rigorous application of the criminal law of bankruptcy, as in France and Germany; the latter embodying extreme consideration for the person of the debtor, as in the United States. In France and Germany, and generally on the continent of Europe, gambling and even extravagant living are criminal offences punishable with imprisonment; in the United States, on the contrary, no one can be made bankrupt against his will, and mere non-payment of debt does not form an act of bankruptcy entitling the creditors to take the estate into their own hands.

The leading object of the American system is the release of the debtor from the burden of obligation which degrades the individual and deprives him of his full status as a citizen. In modern English bankruptcy, punishment predominates, although it is only fair to add that the system of distribution, though costly, is very complete. In Scotland, distribution has clearly the first place. Punishment has no place at all, except where necessary to obtain full disclosure of the assets; while rehabilitation is a minor detail, and only exists in so far as it is entirely consistent with the interests of the creditors, who are the true owners of the property to be distributed.

The Judicial and Administrative Sides.—Bankruptcy legislation differs not merely in its objects, but also in its methods. Every system has necessarily two sides, the judicial and the administrative. In England, France, and Germany the administrative is to a large extent bound up with the judicial. The administrator, like the judge, is an official, and is appointed by the Court either with or without consultation with the creditors. I have included England in this category, for it cannot be said that the option given to creditors to appoint their own assignee to supersede an official assignee already in possession of the estate, is a concession of any real value. On the other hand, in Scotland and the United States the creditors have, through their trustee, the sole control of the administrative functions, subject only to such supervision as is necessary to secure faithful dealing and a due regard to conflicting rights. As to the creditors' trustee, the general rule is that there is no restriction in the choice, provided the person chosen has no interest prejudicial to the equitable adjustment of rights, and that he finds such security as the Court orders or the creditors fix. But in Victoria, under the Act of 1897, a system has been introduced for the registration of trustees. Any person may make application, and if registered, he must find general security for his actings in any estate to which he may be appointed. If the creditors appoint an unregistered person, he must get himself registered and find security before he can act. In Scotland, Germany, and the United States the judicial functions are entrusted to the ordinary local Courts; and recent legislation in Ireland is a recognition of the advantages of this system. France is practically in the same position, each district having a Tribunal of Commerce dealing with commercial matters, including bankruptcy. In England, also, there has of late been a marked advance in the same direction, the ordinary County Courts now taking the place of the cumbrous District Courts of Bankruptcy. In England the necessary supervision of the administrative functions is undertaken by the officials of the Board of Trade; in Scotland by the Accountant of Court; in France by the *juge-commissaire*; and in the United States by the referee.

Incidence of Costs.—The question remains as to the costs, and by whom they are paid. We have already considered the equities, but a few words may be added as to the facts. The expenses of the judicial functions, although,

as we have seen, they do not form a fair charge, are borne in England and Ireland by the creditors in the form of High Court dues and fees. In order to make the bankruptcy system self-supporting, the creditors, unlike other suitors, pay for the entire judicial establishment, including pensions and other legacies left from the still more expensive bankruptcy systems of the past. In Scotland, and so far as we can judge, in Germany, France, and the United States, the fees are no higher, perhaps even less, than those paid by ordinary suitors. In France and in America the State, as we have seen, directly contributes a small sum in cases where, from want of funds, the process of winding-up is likely to be prevented or impeded.

In conclusion, I may express the hope that I have given you some materials for reflection. At the same time I am painfully conscious of the imperfections, and possibly the inaccuracies, involved in this attempt to set forth particular sections of systems of jurisprudence with which I cannot claim any practical acquaintance.

MODERN DEVELOPMENTS OF MOHAMMEDAN LAW.

[Contributed by SIR RAYMOND WEST, K.C.I.E.]

The Conditions of Progress.—The author of this small work, entitled *De l'Action Pénal en Droit Musulman, par Omar Bey Loutfy*, who is a professor of the Law School at Cairo, belongs apparently to the class of modern Mutázilas, or Freethinkers, to whom we must look for such reforms of the Mohammedan Law as in its nature it will admit. That it does admit of great reforms—that is, of such developments and adaptations as will fit it to modern necessities—is the firm opinion of many enlightened Musulmans. It is the hope of many who, without being Musulmans, are friends of the Musulman community, and who, guided by the light of history, look for vital and lasting improvements in Mohammedan polity and law rather to an outgrowth from existing roots in the system than to the forcible introduction of wholly foreign matter from without. The Mutázilas of the first and second centuries from the *hijra* succumbed to the Puritan reaction provoked by their audacious handling of the fundamentals of the Moslem faith; those of the present day are keen controversialists in favour of their creed, but, taking its essentials as a basis, they strive to deduce from these a system as rational and flexible as those of the Christian nations. The explicit teachings of the Korán lend themselves without much strain to this design. The passages that oppose progress can for the most part be got round by comments which assign to them only a special local or occasional application, and the general ethical spirit of the sacred volume is perfectly sound. The traditions present more difficulty. They were gathered in a rude age, by uncritical people, from sources of very various degrees of trustworthiness. They present many inconsistencies, and are to a large extent certainly unauthentic. The first condition of Moslem jural or jurisprudential progress within the limits of orthodoxy is the application to these traditions, and the vast fabric of doctrine built on them, of a wise and free criticism. The way will thus be cleared for bringing most of the gains of European experience and thought within the reach of conscientious Mohammedans. Such a process, though tedious, is almost indispensable. The doctrines which govern men's relations and dealings throughout the

civilised world can almost without exception be "Islámised" by learned and judicious reference to the Korán. When such a basis has been found and established by a recognised authority, the structure erected on it is accepted by the pious Moslem as impregnable and unquestionable; without it he must needs look on secular legislation as a mere group of temporal and temporary expedients having almost no moral claim to his obedience.

"**Islámising.**"—This task of "Islámising" the elements of rational progress must be carried out by the Mohammedans themselves; they only are imbued with the requisite spirit, and can command the requisite confidence. That it is not an impossible one is proved by the examples of their great jurists of the eighth century. The new age calls for a new philosophy of the law; but the materials for this lie ready for the hand that can mould and animate them. A modern Imámdi Azim is called for, one equally sound in principle as his great precursor, but applying a deeper and wider-reaching *qiyás* (or dialectic) to the more complex problems presented by the kaleidoscopic life of to-day. A useful preparation is in the meantime carried on by those writers who, like the learned Bey, become apologists for some part of the Mohammedan system by tracing its analogies to present or past institutions of the Christian nations, or by showing that its penalties are less cruel in practice than they seem. The origin of stoning as a punishment for adultery, and of mutilation for theft, in præ-Islámic customs of the Arabs, cannot be readily accepted as a good reason for the retention of such punishments by a prophet who is believed to have been divinely guided. Nor is it a merit of the system to be set off against these barbarities that they are seldom inflicted on account of the difficulty of satisfying the designedly hard conditions of a conviction. Such conditions are in truth only an additional blot on the system. What is wanted is facility of proof in cases of real guilt,—the absence at least of artificial difficulties,—coupled with penalties duly proportioned to the offence and free from the atrocity which generates callousness to human suffering.

There was a time when a not very dissimilar state of things existed in this country and in Europe generally. The method of enquiry into the guilt of one accused was a balancing of irrelevancies, with a leaning towards a conviction; and coupled with this was a scheme of exonerations that relieved offenders with little regard to their relative demerits. It is no small part of our civilisation that we have outgrown such a system, have found our way to a rational method of investigation and to a scale of punishments which tempers repressive severity with respect for humanity.

Enlightened Mohammedans are conscious that they will have to do likewise; their apologies imply a reference to a higher standard than that of retaliation and of corporal injury as appropriate sanctions for the Criminal Law. But they will have to face the necessities of the case more squarely and boldly before they can make it a point of belief amongst their co-religionists that

such punishments are as opposed to the spirit of the Korán as they now seem agreeable to its letter. There is a tradition in favour of moulding the law to the needs of times and places on which reformers may always take their stand as advocates of progress through free interpretation.

Crime and the State.—To the English lawyer it is interesting to note that the Mohammedan Criminal Procedure prefers in the trial of a case the method of open accusation and debate to the inquisitorial system borrowed on the Continent from the Canon Law. The denunciation of a crime is not the function of an official class, but the right of the person injured. It is his exclusive right, the interest of the State in the matter not having as yet been so generally recognised as to admit any member of the community to be an accuser. This treatment of the subject sprang of course from the earlier system of personal and tribal vengeance for wrong. Mohammed succeeded at once in what was so slowly won by the royal jurisdictions in Europe: he induced his followers to seek retribution at the hands of the sovereign instead of starting a blood-feud. But still the prosecution only took the place of personal vengeance; it was a right that the victim or his heirs could exercise or forego, and the pardon—usually a purchased pardon—by the family of a murdered man long sufficed, even in British India, to withdraw an assassin from the hands of justice. Under a purely Mohammedan *régime* this must still be the law. Omar Bey says the public interest may be guarded by bringing any such case within the category of “tazirs”—*i.e.* offences punished by discretionary penalties independently of the will of the person injured. This has not generally been so understood. The “had,” or fixed punishment, prescribed for some crimes is distinguished from the “tazirs,” or discretionary punishment, for others; but the “kisás,” or right of retaliation, belongs to the complainant to give up equally as to enforce. To punish a murderer after he had satisfied the heirs would in the next similar instance go to deprive the heirs of the blood-money they might otherwise obtain. The “kisás,” or the “had,” it is admitted, cannot be exacted or inflicted save at the instance of the person injured; but according to Omar Bey a “tazir,” undefined by the sacred law, but limited by the sovereign’s regulation, may supersede both “kisás” and “had.” This appears to require some further proof. The “appeal” of the heir under the English Law long subsisted concurrently with the repressive right of the Crown. It will be a curious similarity if by the aid of the doctrine of “Al siassah al sharia,” or “jural policy,” the law of “tazir” should be found capable of such expansion as to overlap, and eventually swallow up, the whole system of “kisás” and “diah” (= money compensation).

“Offences against God.”—The strictly personal right of pursuit in cases of personal injury is emphasised, as it is bounded, in the Mohammedan Law by the existence of a class of “offences against God”—*i.e.* generally against the State or public at large, as distinguished from the individual.

In such cases any member of the community may prosecute, but no one may remit the prescribed penalty. Where the personal interest predominates, as in offences of violence or fraud, the general right is merged in that of the individual sufferer. Omar Bey makes the "tazirs" work side by side with these two classes of prosecutions in cases wherein, as he says, "the legal penalty is for some reason not inflicted." But if it is really a legal penalty, it must be inflicted in a case of proved guilt, except where prosecution and demand of judgment constitute a private right, and in that case the discretionary sentence of the judge is wholly dependent on the claim of the complainant. Such at least is the general doctrine, and it is evidently desirable that Mr. Loutfy should fortify his more advanced position—as no doubt he can—by some arguments drawn from sacred or recognised authorities.

"Infidel" Evidence.—The classification of offences as against an individual or against God—*i.e.* against society—leads to an important distinction in the Law of Evidence. A witness must be *integer vite* according to the Mohammedan Law. But in a private prosecution he, being a Musulman, is presumed trustworthy, unless his integrity is challenged; while in a case not involving direct personal injury, the judge is bound to satisfy himself of the witness's integrity before receiving his testimony. This practically deprives of any value the evidence given by infidels. This subject is not dealt with by the learned Bey. It is of importance in a mixed community, since the non-reception of Christian testimony against a Moslem confers on the latter a virtual license for crime.

Number of Witnesses.—Another subject calling for more complete treatment than has been assigned to it is that of the specific number of witnesses required to establish a case of "had"—*i.e.* one subjecting to a strictly defined punishment. Thus adultery can be proved only by the evidence of four males or of three males and of two females. As failure to establish a charge subjects the accuser to eighty strokes of the bastinado, it is not surprising, perhaps, that prosecutions are very rare. The slightest discrepancy in the evidence is a ground for acquittal and its painful consequences to the complainant, and there may thus be one of the dramatic turnings of the tables in which Oriental story-tellers delight. As Omar Bey observes, it is easy to understand why strict proof is insisted on in such cases, but that is no reason why an artificial, arbitrary rule should supersede the exercise of the judge's reason and conscience. We preserve a trace of a similar system in requiring two witnesses to prove an act of treason; and the system of "legal proofs" on the Continent has not quite disappeared even from Criminal Procedure. But in Bengal one of the earliest modifications of the Mohammedan Law forced on the British governors was the abolition of the rules which Omar Bey approves. The defects of the substantive Penal Law are not to be remedied by another set of defects in the Law of Procedure, but by revision of the substantive law itself.

Confessions.—Confessions play a large part in the Mohammedan procedure, and in cases of doubt a great deal is made to depend on the oath of the defendant. The judge is not bound to attach weight to a prisoner's admission, unless satisfied of its sincerity. Experience has taught Indian judges that amongst Orientals this is a salutary rule. There is another one closely connected with it which has undesignedly been imitated in the Indian Criminal Procedure. The confession which, through infirmative circumstances, will not support a conviction, may yet ground an order for the restitution of the property in question to the apparent owner. But we should think it going much too far to convict an accused on his confession *quâ* the "diah," or blood-fine, and at the same time acquit him *quâ* the "had," or capital punishment annexed to murder. The interest of the relative and complainant in such a case must needs be wholly subordinated to that of the State.

The Right Path of Reform.—We have touched on but a few of the interesting points which Omar Bey's essay presents for a comparison between the Musulman and the Christian systems of Criminal Procedure. His little volume will repay an attentive perusal. It tells us much, both directly and indirectly, as to the present mental attitude of enlightened Mohammedans towards jural expansion and progress. There was a time, extending over centuries, when the Moslem jurisprudence was distinctly in advance of that of Western Europe. It became stationary and obstructive through its sacro-sanctity and its entanglement in a network of inept and unauthenticated traditions. The way to reform is evident, and in a Mohammedan sense the indispensable changes should far rather take the shape of revision and a growth from within than the introduction of incongruous laws from without.

THE SOURCES OF THE LAWS OF THE COLONIES.

[Contributed by W. HARRISON MOORE, ESQ., *Professor of Law in the University of Melbourne.*]

Multiplicity of Sources.—The returns which have been made by the Colonies to the circular of the Society, and published from time to time in this *Journal*, as to the sources of the law in operation in the respective Colonies, display one feature which is bound to strike an English lawyer as remarkable. Accustomed to a legal system whose feature is its unity in source and in authority, he is struck by the multiplicity of sources in the Colonial system; and in place of singleness of authority he finds not a little doubt and conflict. The Common Law, the Prerogative, Acts of Parliament and Orders thereunder, play their part as in England. But the Prerogative looms larger in Colonial than in Home institutions; Acts of Parliament have varying force and authority according to their date and their nature; Orders in Council are less frequently Acts of supplementary legislation than the exercise of a statutory suspending power or power to put into operation. In addition to these are the Acts and Ordinances of Colonial Legislatures, sometimes Legislatures between which the power of legislation is divided, sometimes of Legislatures which have been superseded by others.

This paper was written as an introduction to a study of the Australian Commonwealth Constitution Bill, but it is of general application to settlement colonies, and, indeed, save in a few matters, to colonies of all kinds.

All the Australian Colonies belong to the class of colonies acquired by settlement or occupancy. The doubts once held as to the status of New South Wales as a penal settlement (see Bentham, *Works*, vol. iv.) must now be regarded as set at rest by the decision of the Privy Council in *Cooper v. Stewart*.¹ The sources of the law common to all these Colonies are the following:

The Australian Colonies: Common Sources of the Law: (1) Laws of England.—The laws of England at the time of the settlement (or some date fixed by Statute in lieu thereof), so far as they are applicable to the condition of an infant colony. "It hath been held that if an uninhabited

¹ [1889] 14 App. Cas. 286.

country be discovered and planted by English subjects, all the English laws then in being which are the birthright of every English subject are immediately in force" (Salkeld 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony.¹

The "Laws of England" includes the Statute Law as well as the Common Law. The law so imported is what is sometimes called the Common Law of the colony. The applicability of any law according to the principle laid down is mainly one for judicial determination; but this class of laws falls completely within the power of the Colonial Legislature, which may declare what laws are in force, and may repeal any of them.

(2) **Acts of Parliament made Applicable.**—Acts of Parliament *made applicable* to the colony, either in common with other dominions of the Crown or specially, whether by express words or necessary intendment. These Acts are of paramount obligation.

The expression *made applicable to the colony* requires some explanation. In the first place it excludes those Acts of Parliament which, being part of the General Law of England applicable to the circumstances of the colony, are received at its settlement as part of its Common Law; and it includes all Acts by which Parliament intends to bind the colony, whether those Acts were passed before or after the settlement of the colony.² In the second place, an Act of the Imperial Parliament may relate to a colony without being in force there, just as it may relate to a foreign country. An Imperial Act may relate or refer to persons, to things situated, to acts done, or to events happening in a colony or a foreign country; but the enforcement of the regulation established by the Act may belong to the English Courts alone, and be limited by the powers of these Courts to make their orders effective. The Colonies, through their inhabitants and in other ways, receive by many Statutes certain favourable treatment in England and in English Courts, either absolutely or upon terms of reciprocity—*e.g.* by the Colonial Attorneys Relief Acts, 1857, and the Amendment Act, 1884, the Colonial Probates Act, 1892, and the Finance Act, 1894. These and the like Acts are very commonly regarded as "in operation in the colony"; they are, in fact, "in operation in England in respect to the colony." The importance of this distinction is obvious; but it was ignored by those who compared the financial proposals of the Chancellor of the Exchequer in 1894 with the Stamp Act of 1765 and the Tea Duty Act of 1770. Again, the Wills Act, 1861, ss. 1, 2, affects wills made in the Colonies and wills of persons domiciled in the Colonies, but only for the purpose of admitting them to probate in England and Ireland, and in Scotland to confirmation. The Bankruptcy Acts and the Companies Acts illustrate by contrast the two

¹ Blackstone, Com. 1 107.

² See Lewis, *Government of Dependencies*, p. 201.

different kinds of operation. The Bankruptcy Acts vest in the trustee the debtor's property everywhere in such a way that the trustee's title is enforceable in all parts of the British Dominions; and a discharge in bankruptcy in England is a discharge in a paramount jurisdiction, recognised and enforced in all parts of the British Dominions.¹ On the other hand, in the winding-up of a company in England, while the English Court will treat its orders as affecting all Colonial property of the debtor, and as binding all his Colonial creditors, the operation of these orders is limited by the power of the English Court to give effect to them; and any recognition they may obtain in the Colonies is due, not to any paramount jurisdiction, but to the "comity of nations,"² or whatever principle underlies the "Conflict of Laws."

The general rule, that Acts made applicable to a colony cannot be repealed or varied save by the Imperial Parliament, is occasionally excluded by a provision giving special power to the Colonial Legislature to enact as if the Act had not been passed, and to alter or vary it—e.g. Coinage Act, 1853; or to repeal the Act or some part of it, as the provisions of the Merchant Shipping Act, 1894, relating to ships registered in the possession (s. 735).

(3) **Crown Orders or Regulations.**—Orders or Regulations made by the Crown in pursuance of Acts of the Imperial Parliament to which they are equal in authority. These orders—

- (a) Put an Act into operation in a colony, the Act being in terms postponed in the case of such colony until an order is made. This is the commonest case, and many illustrations might be given—e.g. Colonial Courts or Admiralty Act, 1890, in the case of four colonies scheduled, and the Extradition Act, 1870.
- (b) Suspend the Act, or a portion of it, or apply it with modifications in the case of a colony, generally on the ground that the Legislature of the colony has made suitable provision for carrying out the purposes of the Act—e.g. the Extradition Act, 1870, s. 18; Coinage Act, 1853; Colonial Copyright Act, 1847; International Copyright Act, 1886, s. 8, sub-s. 3; Patents Designs and Trademarks Act, 1883, s. 104.
- (c) Supplement the Act—e.g. the Charters of Justice of New South Wales, 1823, and Tasmania, 1831.
- (d) Bring new subjects within the scope of the Act, as where the operation of the Act depends upon treaties—e.g. the Extradition Act, 1870, and the International Copyright Act, 1886.
- (e) Give to a Colonial law the force of law throughout the British Dominions—e.g. Colonial Prisoners' Removal Act, 1884, s. 12; the Fugitive Offenders Act, 1881, s. 32; Merchant Shipping Act, 1894, s. 264 (application of Part II. by Colonial Legislatures).

¹ *Ellis v. McHenry*, L.R. 6 C.P. 228.

² *New Zealand Loan and Mercantile Agency Co., Ltd., v. Morrison*, L.R. 1898 A.C.

The Orders in Council under the Colonial Prisoners' Removal Act, 1869, s. 4, and the Merchant Shipping Act, 1894, ss. 670-5 (Colonial Lighthouses, etc.) are made upon an address of the Colonial Legislature.

(4) **Prerogative Orders, Charters, Letters Patent.**—Prerogative Orders, including Charters and Letters Patent. These are not of the same importance in a settled as in a conquered colony, for as constitutions come to rest more and more on Statute, the Prerogative recedes. Its most important exercise is in the grant of constitutions, the establishment of executive authority, the appointment of Governors and the definition of their powers, and the setting up of Courts of Justice. Most of these things in Australia, however, are done by the Crown under statutory authority, and so fall into the last class. The Orders in Council relating to Colonial Currency are a conspicuous case of Prerogative Orders in operation in the Colonies.

(The Orders in force in 1890 are contained in the collection published "by authority" under the title *Statutory Rules and Orders Revised*. The Prerogative Orders are contained in an appendix in vol. viii. Later Orders are in subsequent volumes published annually.)

(5) **Ordinances of Colonial Legislatures.**—Laws and Ordinances made by the Legislatures of the colony, meaning thereby the authority other than the Imperial Parliament or the Crown in Council competent to make laws for the colony. There may be more than one such authority. Some colonies have been formed by separation from others, and inherit the laws enacted by the Legislatures of the mother colony before the separation. Such laws, so far as they apply within her borders, the daughter colony may repeal. In other cases there may be Legislatures with exclusive powers over different subjects, or with concurrent powers, but so related that, in case of conflict, the enactment of the one shall prevail over the enactment of the other. Both these conditions are true of the Dominion of Canada and of those colonies of Australia constituting the Federal Council of Australasia. In these cases the powers are generally exclusive; but where the same matter is within the power of both the Central and the Local Legislature, the enactment of the Central Legislature prevails. Each authority retains control over its own laws, and may alone alter or repeal them. Amongst "Laws and Ordinances made by the Legislature of the Colony" are included many Acts of the Imperial Parliament which have been adopted for the colony by the Local Legislature. They form part of the ordinary legislation of the colony, and are to be distinguished from other local laws merely by a rule that where a Statute has before its adoption by the colony received an authoritative judicial construction in England, that construction is deemed binding in the Colonies.

The powers of Colonial Legislatures are defined by the Colonial Laws Validity Act, 1865, 28 & 29 Vict., No. 63. They have power generally to make laws for the peace, welfare, or order and good government of the colony. Special powers of legislation have been conferred by the

Imperial Parliament by many Acts on various grounds, of which the following are the principal:

(a) The general power to make laws has always been limited by a condition that such laws should not be "repugnant to the laws of England." This condition has received widely different interpretations, and the view which has ultimately prevailed has been embodied in the Colonial Laws Validity Act, providing that—

(S. 2) Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any Order or Regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

(S. 3) No Colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England unless the same shall be repugnant to the provisions of some such Act, Order, or Regulation as aforesaid.

But under the influence of narrower interpretations, Acts of Parliament had been from time to time passed to enable the Colonial Legislatures to make laws on specific subjects—e.g. 6 & 7 Vict., No. 22—empowering Colonial Legislatures to make laws for receiving the evidence of barbarous and uncivilised persons. These Acts, although the occasion for them has gone, are generally still in force.

(b) Colonial Legislatures are "local and territorial legislatures,"—an expression used to denote that their power is different in kind from that of the Imperial Parliament. For while the Imperial Parliament, like the organs of every sovereign state, is limited territorially by its power through the Executive and the Courts to give effect to laws, it can constrain every person and every authority within its borders to treat its enactments as valid; and the rule against the extra-territorial operation of Statutes is a rule of interpretation merely, overruled by any clear indication of the intention of Parliament to apply an Act to persons or things outside of the British Dominions. The territorial limitation on a Colonial Legislature, however, is more than a rule of interpretation; it is a rule in restraint of power, sanctioned not merely by the refusal of foreign Courts to recognise rights acquired or acts done under it, but by the refusal of the Courts of the colony itself to treat the enactment as valid. This is the general, but not the universal, opinion as to the nature of the power of a Colonial Legislature.¹ Many of the cases relied on for the opinion in question are

¹ See *Low v. Routledge* [1865], L.R. 1 Ch. 42; *M'Leod v. Att.-Gen. for New South Wales* [1891], A.C. 339; and see the Colonial cases collected and discussed by Mr. Lefroy in his *Legislative Power in Canada*.

unsatisfactory, in that they are decisions not of Courts of the colony whose power is in question, but of an English Court or the Court of another colony, asked to recognise and give effect to the law on grounds of comity. And, adopting the opinion in question, we find no certain test of what is "legislation for the colony."¹

The narrow view by which Parliament has sometimes been moved as to the powers of Colonial Legislatures is manifested by the Acts passed from time to time to enlarge their powers in special cases: *e.g.*, 23 & 24 Vict., No. 122, enables Colonial Legislatures to enact that where any person feloniously injured within the colony shall die beyond the limits of the colony, the offence may be dealt with in the colony where the injury was inflicted. Other Acts enable Colonial Legislatures to make laws having a true operation outside their limits, (a) as enabling acts of authority to be done, or jurisdiction to be exercised in respect of acts done or things happening out of the colony—*e.g.* the Colonial Prisoners' Removal Act, 1869; the Colonial Naval Defence Act, 1865; the Merchant Shipping Act, 1894, ss. 478 (Colonial Inquiries), 736 (Coastal Trade); or (b) as giving to Acts of the Colonial Legislature the force of law throughout the British Dominions—*e.g.* 28 & 29 Vict., No. 64—an Act to remove doubts respecting the validity of certain marriages contracted in Her Majesty's possessions abroad. This is generally effected by an Order in Council made in pursuance of the enabling Imperial Act.

(c) The territorial boundaries set to a colony, whether by the Crown or by an Act of Parliament, and, *prima facie*, the constitution of a colony, bind the Legislature of the colony.² As far as the constitution is concerned, special power has been given in the Constitution Acts of the Australian Colonies to alter the constitution subject to the observance of certain forms; and by the Colonial Laws' Validity Act, 1865, s. 5, every representative Legislature has, and is deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such Legislature, to establish and reconstitute Courts, and to make provision for the administration of justice therein. As to the territory of the Colonies, this also is the subject of special provision in the Constitution Acts, having in view the great extent of New South Wales, South Australia, and Western Australia; and very naturally the power of subdivision was subject to limitations left in the hands of the Crown acting on the advice of the Imperial Ministry. In 1895 the Imperial Parliament passed the Colonial Boundaries Act, which, while conferring general powers of severance and delimitation on the Crown, provides that in a case of colonies with responsible government, which are set out in a schedule and include all the Australian Colonies, the power shall not be exercised except with the consent of the colony.

(d) The "local and territorial" nature of Colonial Legislatures has been

¹ Cf. *M'Leod v. Att.-Gen. for New South Wales*, and *Ashbury v. Ellis* [1893], A.C. 339.

² Cf. *Reg. v. Burah* [1878], L.R. 3 A.C. 889, *per* Lord Selborne, at p. 905.

regarded as implying the reservation of certain matters in which there must be one law for the Empire, or which fell within an Imperial rather than a local policy. Such matters are of course generally the subject of Imperial legislation, so that any Colonial Act thereon would be overridden by the Act of the paramount authority; but the opinion in question is that the matters referred to are excluded from the area of Colonial power, and that an Act of the Legislature under the more general power to make laws for the possession would be *ultra vires*.

Colonial Acts conferring upon aliens the privileges of British subjects within the possession are the most common illustration of matters of this class, as is seen from Chalmers's *Opinions*. Sometimes the law officers allowed them to pass, more often they were disallowed, as beyond the province of a colony. At last 10 & 11 Vict., No. 83, was passed to quieten doubts, and, besides confirming Colonial Acts of Naturalisation, conferred the power of local naturalisation upon all Colonial Legislatures, a power continued by the Naturalisation Act, 1870, s. 16. In their fiscal and commercial policy, in the regulation of shipping and the jurisdiction of Admiralty, the Colonies came at the outset under a political system which treated these matters as Imperial. As the older policy has been abandoned, it has generally not been deemed sufficient to repeal the paramount Imperial Acts; power of legislation has been specially conferred. In regard to duties of customs, the restrictions which accompanied the grant of representative institutions to the Australian Colonies by 13 & 14 Vict., No. 59, have been removed by 36 & 37 Vict., No. 22, and 58 Vict., No. 3. The special powers to make laws as to the coasting-trade and certain other matters of shipping are due partly no doubt to the "territorial" limitations on the Legislature, but partly also to the opinion that the regulation of trade was essentially Imperial. The same may be said of naval defence; for the Colonial Naval Defence Act of 1865, though in supplement of the territorial powers of the Colonial Legislatures, also authorises the proper legislative authority to make provision for maintaining discipline among the men and officers while ashore or afloat within the limits of the colony. The Court of the Vice-Admiral in a colony has always been a branch of the Admiralty, and outside the Colonial system of Courts and jurisdiction. The Court, its judge and jurisdiction alike, have been regulated by Imperial and not by Colonial Statutes and Orders. In 1890, however, by the Colonial Courts of Admiralty Act, it was provided that every Court of law in any colony declared in pursuance of the Act to be a Court of Admiralty, and, in the absence of such declaration, every Court with unlimited civil jurisdiction, should have the same Admiralty jurisdiction as the High Court in England; and (s. 3) the Legislature of any British possession may declare any of its Courts of unlimited civil jurisdiction to be a Colonial Court of Admiralty, and may limit territorially or otherwise its Admiralty jurisdiction, and may vest partial or limited jurisdiction in any inferior or subordinate Court. The

Legislature may not, however, confer any jurisdiction not by the Act conferred upon a Colonial Court of Admiralty.

The view that for some matters the Colonial Legislature does not possess the power even of internal legislation has thus been a reason for conferring special powers. Whether it is well founded has never been authoritatively decided. But if it was a correct opinion, its effect does not appear to be altered by the Colonial Laws' Validity Act, for that Act deals merely with the ground of repugnancy to the law of England; and, as was pointed out¹ many years ago, the objection of "repugnancy" is one thing, the objection of "want of power" is another.

(6) **Rules under Acts of Colonial Legislature.**—Rules, Orders, and Regulations issued by some authority within the colony under powers conferred by the Colonial Legislature—*e.g.* the Governor-in-Council—are hardly to be regarded as an independent source of law. But the Governor has power under some Imperial Acts to issue proclamations, making regulations upon certain matters—*e.g.* the Merchant Shipping Act, 1894, ss. 366, 367; and "every such proclamation shall have effect without as well as within such possession as if enacted in this part of this Act."

¹ See *Papers of the Juridical Society*, vol. iii., "Competence of Colonial Legislatures to Enact Laws in Derogation of Common Right," by T. C. Anstey.

MODES OF LEGISLATION IN THE BRITISH EMPIRE: NEWFOUNDLAND.

[Contributed by SIR J. S. WINTER, K.C.M.G.]

I.—COMMON LAW AS THE BASIS OF STATUTE LAW.

(a) *What is the Common Law of the colony? Under what circumstances and by what authority was it introduced?*

The Common Law of the colony is the Common Law of England, introduced by the colonisation and settlement of the colony.

(b) *Is there any law applicable exclusively to particular races or creeds?*

There is no law applying exclusively to any particular races or creeds.

II.—STATUTE LAW.

(a) *Of what does the Statutory or Enacted Law of the Colony consist? To what extent is it embodied in Charters, Regulations, Orders in Council, Ordinances, or Acts?*

The Statutory or Enacted Law of the colony consists of the Acts of the Colonial Legislature, the first session of which was held in the year 1833 (3 Wil. IV.). Under the authority of these Statutes there are various subordinate methods of legislation—e.g. Proclamations of the Governor, Orders, Regulations, etc., made by the Governor in Council, municipal authorities, magistrates, public health officers, etc.

(b) *To what extent do the Statutes of the United Kingdom operate in the colony by virtue of either—*

- (i) *Original extension of English law to the colony;*
- (ii) *Express provisions of any Order in Council or Charter; or,*
- (iii) *Express adoption by the Legislature of the colony?*

The Statute Law of England, which was in force down to the year 1833 (the year in which the Local Legislature began to enact laws), is in force in the colony, so far as it is applicable to local circumstances. The Statute Law of England in relation to criminal matters comes into operation in the colony one year after its enactment, under the provisions of a Local Statute passed in the year 1837 (1 Vict., No. 4). There are also in force in the

colony various Statutes of the Imperial Parliament, which by their own express provisions are made to apply to the colony. As regards Imperial Statute Law generally, the Local Legislature has always endeavoured to follow or copy Imperial legislation in all important matters, so far as applicable to the colony, and with such modifications as local circumstances require.

(c) *Is the Statute Law of any other colony in force in the colony?*

No.

(d) *Is any code of enacted law of non-British origin in force in the colony?*

No.

III.—METHODS OF LEGISLATION.

(a) *By whom are drafts of legislative measures prepared? Is there any official draftsman? If so, by whom is he appointed, to whom is he responsible, and what are his staff and duties? Do his duties extend to measures introduced by private or non-official members of the Legislative body?*

There is an official draftsman called the Law Clerk of the Legislature, appointed by and responsible to the Governor in Council. His duties are to draft all Bills introduced into both branches, including those introduced by private members; but in practice measures are frequently drafted by private members, with or without the assistance of the Law Clerk. He has no staff or assistants. The Minister of Justice has a general supervision of all legislation, and particularly of Government measures.

(b) *What is the constitution of the Legislative Chamber or Chambers through which measures have to pass? If there are two Chambers, may measures be introduced in either?*

There are two Chambers, or Houses. The Upper House is called the Legislative Council, the members of which are appointed by Her Majesty for life; the Lower House, or House of Assembly, is a representative body. Measures may be introduced in either branch. The colony has responsible government, and the principles as well as the procedure governing legislation are with some few exceptions the same as those in force in the Imperial Legislature.

(c) *Are draft measures published before introduction, or before any other stage? If so, under what rules?*

No.

(d) *Through what stages does a measure pass before it becomes law?*

First and second readings, Committee of the whole House, and third reading, in both branches, after which the assent of the Governor, or, in the case of measures reserved therefore by the Governor, the Royal assent.

(e) *Is there any opportunity afforded for referring measures, while in course*

of passage through the Legislature, to any special officer or committee on points of form?

Not by any Standing Rule or Order. The rule and practice are similar to those of the Imperial Parliament.

(f) Have any steps been taken to secure uniformity of language, style, or arrangement of Statutes, either by means of a measure corresponding to "Brougham's Act" (13 & 14 Vict., No. 21) or by official instruction or otherwise?

There is an Act (No. 1 of the Local "Consolidated Statutes," second series) entitled, "Of the Promulgation and Construction of Statutes," which prescribes the methods by which Statutes are promulgated, and rules for the construction of Statutes, among which latter are various provisions copied in substance from "Brougham's Act" and the Interpretation Act, 1889.

(g) Is there an annual session of the Legislature? Are there any fixed or customary periods of session?

There are no periods of session fixed by any positive law; but the invariable custom has been to hold an annual session, which usually opens in the month of February.

(h) How are the Acts or Ordinances of the colony numbered or distinguished? Are they numbered by reference to the calendar year or to the regnal year, or in any other way? Is it the practice to confer for convenience of citation a "short title" on each Act or Ordinance? How long has this practice been followed?

The Acts of the colony are numbered in reference to the regnal year. The custom has recently grown up of giving a "short title" to important or comprehensive measures.

(i) Are Private Bills (if any) treated separately and under different conditions from Public Bills? On what principle is the line drawn between Public and Private Bills? Are Private Acts or Ordinances separately numbered?

Private Bills require previous public notice of application, and the application is referred to a Select Committee. If the Committee reports in favour of the Bill, it passes through the same stages as a Public Bill. Private Bills are published and promulgated in the same manner as Public Bills, and numbered and included in the same annual volume.

(j) Does any practice exist of accompanying a measure on its introduction by an explanatory memorandum?

No.

IV.—PUBLICATION OF STATUTES.

(a) In what manner and under what authority are Statutes promulgated? What evidence is accepted of a Statute having been duly passed?

Publication in the *Royal Gazette* of the colony, or printing by the Queen's Printer, is a promulgation of the Act, and evidence of its having been passed.

(b) *In what form or forms, and under what authority, are Statutes printed for publication?*

First in the *Royal Gazette* of the colony, by direction of the Governor, and afterwards by the Queen's Printer, both separately and in a collected form or volume.

(c) *Are the Statutes of each session published in a collected form at the end of the session?*

Yes.

(d) *Are the periodical volumes of Statutes accompanied by*

(i) *An index and table of contents ;*

(ii) *A table showing the effect on previous legislation ?*

There is a table of contents with each volume, but no index or table showing the effect on previous legislation.

(e) *What collective editions (if any) of the Statute Law of the colony have been published, and whether by the Government or by private enterprise? Are these or any of them periodicals? Do such editions comprise those Acts of the United Kingdom in force in the colony?*

No such collective edition, except the consolidations of the Statutes hereafter referred to.

(f) *Is there any edition of "Selected Statutes" corresponding to Chitty's "Statutes of Practical Utility"?*

No.

(g) *How are Private Acts published?*

In the same manner as Public Acts.

V.—REVISION OF STATUTES.

(a) *Have any steps been taken for the revision and expurgation of the Statute Law, whether periodically or otherwise? What machinery (if any) exists for this purpose?*

The Consolidation of the Statutes referred to in the answers to Part VII., hereafter, necessarily involved revision and expurgation.

(b) *Is there any edition of "Revised Statutes" showing these actually in force? If so, under what authority is it prepared and published, and what is the date of the latest edition?*

None except the "Consolidated Statutes," hereafter described.

VI.—INDEXING OF STATUTE LAW.

Is there any general index to the Statute Law of the colony? If so, on what principle is it arranged, and after what interval is it revised? Does it include both Public and Private Acts and Ordinances and the Statutes of the United Kingdom which are in force in the colony? Is it accompanied by any

table showing how each Statute has been dealt with? What is the date of the latest edition?

There is no such general index.

VII.—CONSOLIDATION AND CODIFICATION.

(a) What steps have been taken to consolidate the whole or particular parts of the Statute Law, or to codify any branches of the law?

There have been two consolidations of the whole Statute Law of the colony, one down to and including the year 1872, and one down to and including the year 1892. These consolidations were passed through the Legislature in each case as a Bill, going through all its stages, and a revision of and amendments upon previous legislation were embodied in the consolidated measure. Each consolidation operated as a repeal of all previous and separate Statutes. In addition to these consolidations several of the most important Imperial Statutes, codifying the law upon particular subjects, have been copied and enacted by the Local Legislature.

(b) Does any machinery exist for this purpose? Is the work now in progress?

No permanent machinery for such work exists, nor is any such work now in progress.

(c) What "codes" are now in force in the colony? When and by whom were they prepared, and on what materials were they based?

None but those referred to in the next preceding answer.

VIII.—SUBORDINATE LEGISLATION.

What official or other machinery exists for the preparation, passing, or promulgation of measures of subordinate legislation, such as Rules and Orders made by the Governor, or a minister or department under the express authority of Statute or Ordinance? Is there any, and what collection of, or index to, such subordinate measures?

There is no permanent or uniform machinery for such subordinate legislation. The machinery is prescribed in each case by the Statute authorising the particular subordinate legislation. There is no collection of, or index to, the subordinate measures

RECENT LEGISLATION ON INEBRIATES IN ENGLAND AND THE COLONIES.

[*Contributed by* ERNEST M. POLLOCK, ESQ., *and* A. M. LATTER, ESQ.]

Progress of the Movement.—Special legislation for the treatment of inebriates has recently advanced beyond the stage of discussion, and has been adopted both at home and in the Colonies. The original foundation of action in the matter was laid in England, but the principle underlying the whole treatment has been fully developed in the Colonies alone.

The legislation in the Colonies on this question strikes very deep into the theories of the responsibility of the State for its members and of the responsibility of the individual for his own actions. The English legislation deals only with the first of these.

The Habitual Drunkards Act was passed in England in 1879 (42 & 43 Vict., No. 19), and was tentative only, and to that end its duration was limited to ten years. The importance of the measure as a step in the path of progress, rather than its value in actual administration, secured its continuation beyond the original time limit, and by the Inebriates Act, 1888, 51 & 52 Vict., No. 19, it was made perpetual. Subsequently the Inebriates Act, 1898, was passed (61 & 62 Vict., No. 60), and by s. 30 is to be construed as one with the previous Acts of 1879 and 1888, the three forming the Inebriates Acts, 1879 to 1898.

In 1896 the Inebriates Act, No. 32, was passed by the Legislature of the Cape of Good Hope. The effect of this Act is largely the same as that of our own Act of 1879; but "inebriate" is interpreted to mean "a man who is by reason of habitual intemperate drinking of intoxicating liquor, or habitual intemperate use of anæsthetics or narcotics, at times dangerous to himself or others, or incapable of managing himself or his affairs." In the same year (1896) Queensland passed an Act (No. 14) of great importance, and in 1898 New Zealand passed the Inebriates' Institutions Act, No. 8; while in the same year a Bill was originated in, and passed, the Legislative Council of New South Wales, ready for presentation to the Legislative Assembly for its concurrence. This does not yet appear to have been obtained, possibly because the legislation necessary to the Commonwealth scheme made too great inroads upon the time of the Assembly.

Home Legislation.—Dealing first with the home legislation, under the Act of 1879 no inebriate is admitted to a retreat except on his own application. Whenever admitted, he may lawfully be detained; but no order for detention is to exceed a period of twelve months. The result, therefore, of legislation as it stood until the last few years may be summed up as merely giving a summary method of enforcing the agreement entered into by the inebriate of his own free will.

The Act of 1898 extended the limit of detention to two years, and made a great advance on the purely voluntary system. In reality it amounts to a recognition by the State of its duty to treat offences arising from habitual drunkenness in as distinct a manner as those arising from lunacy. By this Act the provisions for the treatment of voluntary inebriates under the earlier Act were improved and their readmission to retreats facilitated. By s. 1, sub-s. 1, "When a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied from the evidence that the offence was committed under the influence of drink, or that drunkenness was a contributory cause of the offence, and the offender admits that he is, or is found by the jury to be, a habitual drunkard, the Court may, in addition to or in substitution for any other sentence, order that he be detained, for a term not exceeding three years, in any State inebriate reformatory, or in any certified inebriate reformatory, the manager of which is willing to receive him." Further, a person who commits any of certain offences specified in the Schedule which may be summarised as offences arising from conduct while drunk, and who has in the previous twelve months been convicted three times of such offences, and "who is a habitual drunkard," may be detained for a term not exceeding three years in a certified inebriate reformatory.

Retreats are licensed by the County Council, and the reformatories of both classes by the Secretary of State. But whereas State reformatories are to be built by the Secretary of State, with the approval of the Treasury, out of the funds provided by Parliament, certified reformatories may, by leave of the Secretary of State, be built and supported by local bodies or private persons, and their expenses be defrayed by the local body, power being left to the Treasury itself to contribute.

The definition of "habitual drunkard" is (s. 3 of Act of 1879) "a person who, not being amenable to any jurisdiction in lunacy, is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or his affairs." This does not include intemperance from the opium or morphia habit, and probably "intoxicating liquor" would be interpreted to include only the commonly used alcoholic liquors.

Its Governing Principle.—The English legislation, therefore, shortly put, amounts in principle to this: the drunkard, if and so far as he commits an offence against the penal code of the State which is caused or

contributed to by his intemperance is, like the lunatic, recognised, and is subjected to preventive as well as punitive treatment for his actions. But there is no such thing in England as the status of a drunkard, as there is of the lunatic; and the relations or friends of a profligate, as distinguished from a criminal drunkard, have no remedy against him unless or until his excesses bring him within s. 116 of the Lunacy Act of 1890.

Colonial Legislation.—On these points, both as to the interpretation of an "inebriate" and as to the investment of the relations and friends of an inebriate with a power of action, the Colonies have adopted a much wider policy. The root distinction between their legislation and ours lies in this, that theirs starts from the narrower province of the relations of the State and its members and deals with the broad question of the responsibility of the individual in certain circumstances.

Queensland.—The Queensland Act (No. 14) was passed in 1896, and is divided into three parts. Part I. contains the interpretation clauses, and by these the Act applies to persons who have been habitually intemperate in the use of intoxicants or drugs, which are interpreted to include opium, morphia, cocaine, chloral, or any other drug capable of producing mental aberration. Part III. provides regulations for retreats. Part II. enacts that an inebriate may, on the inebriate's own application, or on that of her husband or his wife, as the case may be, or on that of any relation or friend, be taken into a licensed retreat for a period not exceeding twelve months. The application by a relation or friend may be made to a judge of the Supreme Court or a District Court, or to two justices, one being a police magistrate. The procedure on such an application is curious. If the application is proved to be "reasonable," the Court may summon the alleged inebriate to show cause why he should not be committed to an institution for inebriates (s. 7). If, on the hearing of the summons in the presence or absence of the alleged inebriate, it appears that by reason of the excessive use by him of intoxicating drinks or drugs he is (1) unable to control himself or incapable of managing his affairs, or (2) dangerous to himself or others, or (3) suffering or recovering from delirium tremens, or in imminent danger of death from the continuous use of such drinks or of drugs, and it is also certified by two medical men that the inebriate requires curative treatment, or it is proved that he has not less than five convictions already recorded against him for being found drunk on licensed premises or in a public place, the Court may make an order for his detention in an institution for a period not exceeding twelve months. The order for the detention of the drunkard may be rescinded or renewed. Provision is also made for payment to be made by the inebriate for the expense of his detention and the method of its recovery.

New Zealand.—Practically the same provisions have been adopted by the New Zealand Act of 1898, No. 8. The interpretation of "inebriate"

includes a person rendered such by the use of drugs, and its provisions may be set in motion by a husband or wife or relation or friend.

New South Wales.—The New South Wales Bill has not yet passed into law, but as it has passed the Legislative Council its provisions deserve notice. By s. 1 of this Act the class of persons who may make an application is not quite so wide as "any relation or friend," but is stated to be the husband, wife, parent, brother, sister, son or daughter of full age, and includes a partner in business of the inebriate. The application may also be made by the inebriate himself (provided, as in all the other cases, that he is at the time sober), or by his medical attendant, or by a member of the police force above a certain rank, or by a justice of the peace. The application is to be made to a judge of the Supreme Court or a District Court, or the Master in Lunacy, or any stipendiary or police magistrate; and the period of detention is not to exceed twelve months. The detention may be either in a licensed institution or in the charge merely of attendants under the control of the judge, master, or magistrate; but no order for detention is to be made except on the personal inspection of the judge, master, or magistrate, and on the certificate of a medical man, together with corroborative evidence by some other person. By s. 4 the same authorities may make an order as to the management of the inebriate's property; and by s. 5 the Supreme Court in its lunacy jurisdiction may make all the orders concerning the same as though the inebriate were a lunatic inside the New South Wales Lunacy Act, 1898. Not among the least wise of the provisions of this Act is s. 12, in which publication of these proceedings before the Court in these cases is forbidden—a step in the direction of s. 6, sub-s. 3, of the English Lunacy Act by which the secrecy of the petition is absolutely secured.

The Theory of Colonial Legislation.—Granted that the principle on which the Colonial legislation is based is correct—namely, that there is a point at which a man ceases to be a free agent, and without committing any criminal offence yet renders himself dangerous to others and himself—due provision seems to have been made for the liberty of the subject. There are two checks on any rash, unsuitable, or unjust attempt to order the detention of any man. The first is the personal inspection of the inebriate by the Court; and the sense and integrity of the tribunal must of course be always assumed. The second is the certificate of the medical man or men; and care is taken that this certificate does not proceed from any interested or tainted source. No order is to be made for the confinement of an inebriate in which the medical man giving the certificate is in the very remotest degree interested.

Duration of Detention and Discipline.—There is one point on which the more halting legislation of the mother country contains a useful suggestion. The Act of 1898, as has been mentioned, extended the period for which a patient under the Act of 1879 might be detained from one year to two years.

None of the Colonies permit the period to exceed twelve months, although the Queensland Legislature has made provision for renewal. It is very doubtful whether in the case of either alcohol or other drugs the period is sufficiently long, and in any case provision for the renewal of the term might, it seems, be usefully granted on the application of the same persons as those qualified originally to apply.

The English and Colonial Acts all contain similar provisions for the management and discipline of the reformatories or homes. These contain powers to recapture escaped inebriates and punish the attendants for supplying the means of inebriation. But these provisions are essentially details which do not affect the broader issues involved in this question.

It will be interesting to note how far the provisions of the Colonial Acts are resorted to in cases where narcotics or drugs are the intoxicants, and with what results.

PRELIMINARY EXAMINATION OF PATENTS AND COMPULSORY LICENCES.

[Contributed by A. WOOD RENTON, ESQ.]

I.

THE recent appointment by the Board of Trade of a Committee to enquire into and report upon, *inter alia*, the questions

- (i) whether any and what additional powers should be given to the Patent Office to (a) control, (b) impose conditions on, or (c) otherwise limit the issue of letters patent in respect of inventions which are obviously old, or which the information recorded in the Office shows to have been previously protected by letters patent in this country;
- (ii) whether any, and if so, what, amendments are necessary in the provisions of s. 22¹ of the Patents, etc., Act, 1883,

may render a summary of the provisions of colonial and foreign law in regard to these matters of some interest. The reference to the Committee, indeed, expressly excludes from its consideration the subject of any general system of examination as to the novelty of inventions in respect of which letters patent are granted. This exclusion represents what has long been the official view in England (cp. *Parl. Pap.*, 1873, No. 741, p. 238). But, as will be seen immediately, the preliminary examination into novelty assumes a variety of suggestive forms; and it is, after all, the most popular solution which experience has supplied of the problem how to prevent "the issue of letters patent in respect of inventions which are obviously old." No apology is offered, therefore, for assigning to it a place of some prominence in the following summary, although the terms of the reference make any detailed discussion of the question of preliminary examination superfluous.

In dealing with compulsory licences it will be necessary to take account of the closely allied methods whereby many countries seek to confine within narrow limits the interference by exclusive privileges with national industry

¹ S. 22 enables the Board of Trade to order the grant of compulsory licences of a patent, if it is proved that, by default of the patentee, (a) the patent is not being worked in the United Kingdom, or (b) the reasonable requirements of the public with respect to the invention cannot be supplied, or (c) any person is prevented from working or using to the best advantage an invention of which he is possessed.

—*viz.*, the imposition upon patentees (usually under a penalty of being deprived of their rights on default) of obligations

- (i) to bring their patented inventions into use in the countries granting the patents within a certain period ("compulsory working": *exploitation*);
- (ii) not to discontinue such working for more than a certain period during the patent-term;
- (iii) not to import, into the countries granting their patents, articles manufactured under such patents elsewhere.

It should be premised that under the International Convention of 1883 for the Protection of Industrial Property free importation of patented articles into all the States of the union without the penalty of forfeiture is now allowed, but the patentee remains bound to "work" his patent in conformity with the laws of the country into which he introduces the patented articles (Art. 5).

We may now proceed, first, to deal successively, on the lines above indicated, with the laws of the COLONIES (II.), and of FOREIGN COUNTRIES (III.), and then to endeavour to sum up the results of the enquiry in a few CONCLUDING OBSERVATIONS (IV.).

I have used for the purpose of the following summaries, besides the official texts of the various laws wherever these were available, the admirable volumes of *Patent Laws of the World*, edited by Mr. E. Carpmael, and published under the auspices of the Chartered Institute of Patent Agents; and, to some extent, the *Annuaire de Législation Étrangère*, many of the annotations in which are most valuable.

II.—THE COLONIES.

Australia—*New South Wales* (No. 19 of 1899).—Petitions for letters patent are referred by the Minister of Justice to the Examiner of Patents for report; and if the Examiner reports that "he approves of the prayer of the petitioner" (s. 5 [1]), letters patent may be granted. There are no provisions for

- (a) preliminary examination into novelty,
- (b) compulsory working,
- (c) forfeiture or revocation on the ground of discontinuance,
- (d) compulsory licences, or
- (e) as to the importation of patented articles.

— **Queensland** (No. 13 of 1884, No. 5 of 1886).—It is the duty of the Examiner to report, *inter alia*, whether any of the following conditions exist with regard to an invention sought to be patented:

- (a) That it is not novel;
- (b) That it is already in the possession of the public with the consent or allowance of the inventor;

- (c) That the invention has been described in a book or other printed publication, published in Queensland before the date of the application, or is otherwise in the possession of the public ;
- (d) That the invention has already been patented in Queensland (No. 5 of 1886, s. 7 [1]).

If the Examiner reports that any such condition exists, the Registrar may refuse to accept the application or specification or to recommend the grant of a patent (s. 7 [2]), giving notice of refusal to the applicant, who has a right of appeal to the Law Officer (s. 7 [3, 4]). The Law Officer may obtain the assistance of an expert, to whom the applicant is to pay such remuneration as the Law Officer appoints (s. 7 [5]). S. 25 of No. 13 of 1884 gives the Governor in Council power to order the grant of compulsory licences in terms substantially identical with those of s. 22 of the Imperial Act. There is no provision for

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) as to the importation of patented articles.

General power is given to the Registrar to refuse to grant a patent "the use of which would, in his opinion, be contrary to law or morality" (No. 13 of 1884, s. 84).

— *South Australia* (No. 78 of 1877).—The Commissioner of Patents may refer any petition for a patent, whether opposed or not, to one or more competent persons for enquiry and report (s. 25). The determination of the Commissioner on any such case is final, but the applicant is entitled, on giving four weeks' previous notice in the *Government Gazette* of his intention so to do, to make one or more fresh applications for a patent in respect of the same invention (s. 26). This latter provision rather points to the enquiry of the Examiner being restricted to questions of formal sufficiency. There are no express provisions as to

- (i) forfeiture or revocation on the ground of discontinuance,
- (ii) compulsory licences, or
- (iii) importation of patented articles ;

but the Government may revoke a patent if it appear that within three years from its date the patentee or his assignee or licensee has not used the patented invention to a reasonable extent for the public benefit (s. 48). The Government may use a patented invention on terms (s. 36). The prerogative of the Crown in regard to granting or withholding patents is preserved in very comprehensive terms (s. 32).

— *Victoria* (No. 1123 of 1890).—Every application is referred by the Commissioner of Patents to an Examiner to report, *inter alia*, "whether, to the best of the knowledge of such Examiner, such invention is not novel or is already in the possession of the public with the consent and allowance of the true and first inventor" (s. 9). On an adverse report by the Examiner, the Commissioner may refuse the application, subject

to an appeal to the Law Officer (s. 10). There are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance,
- (iii) compulsory licences, or
- (iv) importation of patented articles ;

but the Commissioner may direct the insertion of all such conditions, restrictions, and provisions as he may deem useful and expedient or necessary (s. 16), and the Governor in Council has power to withhold a patent and order the specification to be cancelled (s. 73 [2]). There is also a general power to refuse a patent where the use of the invention would be contrary to law (s. 64). The Government may use the invention on terms (s. 48).

— *Western Australia* (No. 5 of 1888).—There is no preliminary examination into novelty. As to the scope of the Examiner's duties, see s. 9. Compulsory licences may be ordered by the Governor in Council on terms identical with those of the Imperial Act (see s. 27). There are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) as to importation of patented articles.

The Government may use the invention on terms (s. 32).

See also *NEW ZEALAND* and *TASMANIA*.

Bahama Islands (52 Vict., No. 23 ; 53 Vict., No. 2 ; 54 Vict., No. 12).

—There is no preliminary examination into novelty. Under s. 11 of the principal Act (52 Vict., No. 23), the invention had to be brought into operation within three years ; but that provision was repealed by 54 Vict., No. 12, s. 6. Compulsory licences may be ordered to be granted by the Governor in Council on terms substantially identical with those of s. 22 of the Imperial Act (see s. 7). There is no provision as to

- (i) importation of patented articles by the patentee, or
- (ii) forfeiture or revocation on the ground of discontinuance of working.

Barbados (Patent Act, 1883 ; No 37 of 1892-93).—There is no preliminary examination into novelty, nor any provision as to compulsory licences or forfeiture or revocation on the ground of discontinuance ; but (Act of 1883, s. 9 ; No. 37 of 1892-93, s. 33) the exclusive right ceases if the invention is not brought into operation within a period of seven years.

Bermuda.—There is no statutory patent law in Bermuda.

British Guiana (No. 1 of 1861).—Applications are referred for examination and report to the Attorney-General, who is at liberty, in examining the provisional specification,¹ to call to his aid "such scientific or other person as he may think fit," at such remuneration as he may appoint (s. 5 [1]). It

¹ The complete specification is to be filed within six months of the grant of the letters patent (s. 14 [1]), unless (s. 6) the inventor chooses to deposit it in the first instance in lieu of the provisional.

is in every case "entirely at the hazard of the petitioner whether the invention is new or will have the desired effect" (s. 5 [2]). There is no provision for

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) compulsory licences, or
- (iv) prohibiting the importation of patented articles by the patentee;

but a patent is declared to be void if the "patentee, his heirs, executors, administrators, or assigns does or do not supply or cause to be supplied for Her Majesty's service in [the Colony] all such articles of the said invention as he or they may be required to supply by the officers administering departments of Her Majesty's service in [the Colony] for the use of which the same is required, in such manner, at such times, and at and upon such reasonable prices and terms as may be settled for that purpose by the Governor" (s. 14 [1]).

British Honduras (Law of September 10, 1862; 26 Vict., Sess. 1, No. 2; *Consolidated Laws of British Honduras*, Part xxvi., c. 74).—Applications are referred for examination to the Attorney-General, who, as in the case of BRITISH GUIANA (*sup.*), has power to call in some "scientific or other person" to assist him, and cause such remuneration to be paid to that person as he may appoint (ss. 6, 7). There is no preliminary examination into novelty, and there is no provision for

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance,
- (iii) compulsory licences, or
- (iv) as to the importation of patented articles by the patentee.

British India (No. 5 of 1888).—There is no express provision for preliminary examination into novelty; but under s. 6 (2) the Governor-General in Council, before making an order authorising an applicant to file a specification of his invention, "may direct that the application be referred for enquiry and report to any person whom he thinks fit," and who (s. 6 [3]), if not in the service of the Government, is to receive such fee as the Governor-General in Council, after considering the report, may determine. A rule may be applied for to a High Court to show cause why an exclusive privilege in respect of an invention (s. 30), or part of an invention (s. 31), should not be declared not to have been acquired on the grounds, *inter alia*, of want of utility or of novelty. Notice of the rule is to be served on all persons appearing from "the address-book" (as to which see s. 13 [1]) to be proprietors of the exclusive privilege, or to have shares or interests therein (s. 34 [1]), and the High Court to which application for the rule is made may direct an issue to be tried before itself or another High Court or District Court (s. 35, and see further, as to subsequent proceedings, ss. 36, 40). There is no provision for

- (i) compulsory working,

(ii) forfeiture or revocation on the ground of discontinuance, or
 (iii) as to the importation of patented articles by the patentee,
 but compulsory licences may be ordered (s. 43, which is practically a transcript of s. 22 of the Imperial Act).

British New Guinea.—By s. 2 and Schedule A of the Courts and Laws Adopting Ordinance (Amended) of 1889 (No. 6 of 1889), the following Queensland Acts and the rules made under them were adopted: No. 13 of 1884, and No. 5 of 1886 (see *sup.*, AUSTRALIA, *Queensland*).

British North Borneo.—The Straits Settlements (see *inf.*) Ordinance, No. 12 of 1871, is adopted (Proclamation No. 1, of 1887).

Canada (Stats. of Can., No. 61 of 1886; 55 & 56 Vict., c. 24).—The Commissioner of Patents may object to grant a patent in the following, among other, cases:

- (i) When he is of opinion that the alleged invention is not patentable in law;
- (ii) When it appears to him that the invention is already in the possession of the public, with the consent or allowance of the inventor;
- (iii) When it appears to him that there is no novelty in the invention;
- (iv) When it appears to him that the invention has been described in a book or other printed publication before the date of the application, or is otherwise in the possession of the public (No. 61 of 1886, s. 16).

On each application for a patent a thorough and reliable examination is made by competent examiners appointed by the Patent Office for the purpose (55 & 56 Vict., c. 24, s. 8). When the Commissioner objects to grant a patent, he is to notify the applicant to that effect, and state the grounds of his decision with sufficient detail to enable the applicant to answer, if he can, the Commissioner's objection (No. 61 of 1886, s. 17), and the applicant may appeal, within six months after such notice, to the Governor in Council (s. 18). A patent is null and void at the end of two years from its date unless the patentee or his legal representatives or his assignee within that period, or any authorised extension of it, "commence, and after such commencement, continuously carry on in Canada the construction or manufacture of the invention patented in such a manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price, at some manufactory or establishment for making or constructing it in Canada." Moreover, if, after the expiration of twelve months from the granting of a patent or any authorised extension of its term, the patentee or patentees or any of their representatives or assignees should import or cause to be imported into Canada the invention for which the patent is granted, such patent is void "as to the interest of the person or persons importing or causing to be imported as aforesaid." Questions arising under these provisions may be adjudicated upon by the Exchequer Court of Canada (without prejudice to the jurisdiction of any other Court).

upon information in the name of the Attorney-General of Canada or at the suit of any person interested (No. 61 of 1886, s. 37; 55 & 56 Vict., c. 24). The Government may use any patented invention on paying reasonable compensation to the patentee.

Cape of Good Hope (No. 17 of 1860).—The applicant, after depositing his specification at the office of the Colonial Secretary, gives notice to the Attorney-General of his intention to proceed with his application, and obtains an appointment for a hearing. At the hearing the Attorney-General "may call to his aid such scientific or other person or persons as he may think fit, and may, by writing under his hand, order to be paid to such person or persons some remuneration for his or their attendance" (s. 7). But there is no provision for

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance,
- (iii) compulsory licenses, or
- (iv) as to importation of patented articles by the patentee.

Ceylon (No. 16 of 1892).—Before making an order authorising a petitioner to file a specification of his invention, "the Governor in Executive Council shall direct that the petition be referred for enquiry and report to any person whom he thinks fit" (s. 5 [2]), the petitioner being required to deposit such fee for the referee as the Governor in Executive Council may fix (s. 5 [3]). But the above enquiry appears to be limited, by implication (see s. 5 [5]), to questions of formal sufficiency. There is no provision as to

- (i) compulsory working,
- (ii) forfeiture or abandonment on the ground of discontinuance, or
- (iii) as to the importation of patented articles by the patentee;

but an application to declare an exclusive privilege in an invention, or part of one, not to have been acquired, may be made under conditions practically identical with those stated *sup.* under BRITISH INDIA (ss. 28, 29), and compulsory licences may be ordered (s. 39, substantially a transcript of s. 22 of the Imperial Act).

Channel Islands.—Patents granted under the Imperial Act of 1883 do not extend to the Channel Islands; grants already made at the commencement of that Act, and prolonged under it, do (see s. 113 and cp. *Brandon's Patent*, 1884, 9 App. Cas. 589). Arrangements for the extension of the Imperial Act to the Channel Islands have been proposed, but have not been carried out, and there is at present no statutory patent right for inventions in these islands. *Seem*, under s. 116 of the Imperial Act, which saves the royal prerogative "in relation to the granting of any letters patent," the Crown might include the Channel Islands in any such grant.

Falkland Islands.—There is no statutory patent law in the Falkland Islands.

Fiji (No. 3 of 1879).—There is no provision for

- (i) preliminary examination into novelty,

- (ii) compulsory working,
- (iii) forfeiture or revocation on the ground of discontinuance,
- (iv) compulsory licences, or
- (v) as to importation of patented articles by the patentee.

The Attorney-General issues a provisional certificate protecting the invention (if he deems it *prima facie* entitled to protection) for six months in like manner as by letters patent (s. 11), and an appeal lies from his refusal of such a certificate to the Governor in Council (s. 12). The Attorney-General may apply to the Supreme Court for cancellation or revocation of any letters patent on the grounds, *inter alia*, of lack of novelty or utility (s. 4). One month's notice at least of the Attorney-General's intention to proceed in this way is to be given by notice in the *Royal Gazette* (s. 20).

Gambia.—There is no statutory patent law in Gambia.

Gibraltar.—There is no statutory patent law, but special Ordinances are passed conferring exclusive privileges on inventors who have obtained patents for their inventions in the United Kingdom (cp. No. 5 of 1890; No. 1 of 1896; and No. 1 of 1898). The special Ordinance recites the grant of the patent under the Imperial Act and the inventor's petition that it may be extended, and then goes on to grant to the patentee, during the subsistence of his original patent, the same rights and privileges in Gibraltar as he enjoys in the United Kingdom. The Gibraltar patent is to terminate *ipso facto* with the original one, and the royal prerogative is saved. No. 1 of 1898 contains the following additional clause :

Provided always that the said patentee shall supply, or cause to be supplied, for Her Majesty's service, all such articles of the said invention as may be required by the officers administering any department of Her Majesty's service in Gibraltar in such manner, at such times, and also upon such reasonable prices and terms as before or after the use thereof shall be agreed upon between those officers, with the approval of the Governor, and the patentee, or in default of such agreement, on such terms as may be settled by the Chief Justice in a summary manner after hearing all parties interested.

Gold Coast (No. 1 of 1900).—This Ordinance is, to a large extent, a transcript of the Imperial Act. There is no provision for

- (i) preliminary examination into novelty,
- (ii) compulsory working,
- (iii) forfeiture or revocation on the ground of discontinuance, or
- (iv) as to importation of patented articles by the patentee.

Compulsory licences may be ordered by the Governor in Council on terms practically identical with those prescribed by s. 22 of the Imperial Act (s. 25).

Hong-Kong (No. 2 of 1892).—There is no provision for

- (i) preliminary examination into novelty,
- (ii) compulsory working,
- (iii) forfeiture or revocation on the ground of discontinuance,

- (iv) compulsory licences, or
- (v) as to importation of patented articles by the patentee.

The petition for letters patent is dealt with by the Governor in Council, who may "grant or refuse the prayer of the said petition as shall appear expedient" (s. 4).

Jamaica (No. 30 of 1857; No. 15 of 1891).—There is no provision for

- (i) preliminary examination into novelty,
- (ii) forfeiture or revocation on the ground of discontinuance,
- (iii) compulsory licences, or
- (iv) as to importation of patented articles by the patentee;

but the patent must, on pain of forfeiture, be brought into operation within two years after its date (No. 30 of 1857, s. 7). Petitions are referred to the Attorney-General, who may "call to his aid such scientific or other person as he may think fit," and cause to be paid to such person by the applicant such remuneration, not exceeding £5, as he may appoint. If the Attorney-General is satisfied that "the application is such as may properly be granted under the provisions of [the Act], and that the specification describes the nature of the invention, discovery, or improvement," he endorses his fiat on the petition; if not, he certifies the reasons of his refusal (s. 2 and No. 15 of 1891, s. 9). If it appears to the Attorney-General, *inter alia*, on reference of an application to him, that "in any way the requirements of the law have not been observed," he may require the application to be amended before proceeding with it (No 15 of 1891, s. 7). The patent law of Jamaica was extended to Turk's and Caicos Islands by No. 7 of 1897.

Lagos.—No statutory patent law exists.

Leeward Islands (No. 12 of 1876).—There is no provision for

- (i) preliminary examination into novelty,
- (ii) compulsory working,
- (iii) forfeiture or revocation on the ground of discontinuance,
- (iv) compulsory licences, or
- (v) as to importation of patented articles by the patentee.

Applications are referred to the Attorney-General (s. 7), who may "call to his aid such scientific or other person as he may think fit," and cause to be paid to such person by the applicant such remuneration as he appoints. But "if the Attorney-General be satisfied that the provisional specification describes the nature of the invention, he shall allow the same and grant a certificate of his allowance, although he may require amendment if the title of the invention or the provisional specification is too large or insufficient" (s. 8). The patent is ultimately sealed under the Attorney-General's warrant (s. 15). The prerogative of the Crown in regard to the granting or withholding of letters patent is preserved by s. 16 in terms of unusual comprehensiveness. The Governor by warrant under his hand may direct

- (a) the Attorney-General to withhold his warrant, or

- (b) if the warrant has issued that the patent shall not be sealed, or
- (c) that "any restrictions, conditions, or provisions" which he may think fit shall be inserted in any patent, or
- (d) that any complete specification which may have been filed, and in respect of which no letters patent may have been granted, should be cancelled.

Malta (No. 11 of 1899).—There is no preliminary examination into novelty. But—a curious application of the principles involved in the ordinary rules as to compulsory working, forfeiture, or revocation on the ground of discontinuance, and compulsory licences—"the holder of a patent may be compelled to assign his right, or to grant the use thereof, for a consideration to be determined by the competent Civil Court, if the industrial invention or modification to which the patent refers shall not have been put into use within twelve months subsequent to the concession, or if its working shall have been suspended for twelve months continuously" (s. 50). There is no prohibition of the importation of patented articles by the patentee.

Mauritius (No. 16 of 1875).—There is no preliminary examination into novelty, and every patent is granted "without any warranty of any kind or nature whatsoever on the part of the Government" (s. 11). A patent may be withdrawn "if it be proved to the satisfaction of the Governor in Executive Council that the same or the mode in which it is exercised is mischievous to the Colony or generally prejudicial to the public" (s. 17). Proceedings similar to those mentioned *sup.* under BRITISH INDIA may also be taken on motion to the Supreme Court to obtain the cancellation of patents, *inter alia*, on the grounds of lack of utility or novelty (ss. 29-34). There are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance,
- (iii) compulsory licences, or
- (iv) as to importation of patented articles by the patentee.

Natal (No. 4 of 1870; No. 2 of 1895).—There is no provision for

- (i) preliminary examination into novelty,
- (ii) compulsory working,
- (iii) forfeiture or revocation on the ground of discontinuance,
- (iv) compulsory licences, or
- (v) as to the importation of patented articles by the patentee ;

but the Attorney-General, before issuing his warrant for granting the patent, "shall direct the insertion in such letters patent of all such restrictions, conditions, and provisoes as he may deem usual and expedient in such grants, or necessary in pursuance of this law"¹ (No. 4 of 1870, s. 9), and

¹ The form of warrant is given in Sched. IV. to the Act. The material clause is as follows: "I am of opinion that as it is entirely at the hazard of the said applicant whether the said invention is new or will have the desired effect, Her Majesty's Royal

s. 10 empowers the Lieutenant-Governor to order the Attorney-General to withhold his warrant, etc., in terms similar to those stated above under LEEWARD ISLANDS.

Newfoundland (Consol. Stats., Tit. xii., c. 109).—There is no provision as to

- (i) preliminary examination,
- (ii) compulsory licences, or
- (iii) forfeiture or cancellation on the ground of discontinuance ;

but a patent becomes void if not brought into operation within two years (in the preliminary Table of Sections the time specified is twelve months) after its date (s. 12).

New Zealand (No. 12 of 1889 ; No. 8 of 1897).—There is no preliminary examination into novelty, and there are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) importation of patented articles by the patentee ;

but compulsory licences may be ordered by the Governor (No. 12 of 1889, s. 33, a transcript of s. 22 of the Imperial Act, and see No. 8 of 1897, Sched. I., *Form of Patent*).

St. Helena (No. 3 of 1872).—This Ordinance merely provides for the extension to St. Helena of patents granted in the United Kingdom. "All cases of doubt and difficulty not provided for by the ordinance or the local law" are to "be guided and governed so far as practicable by the law in force in England" (s. 5). There are no provisions as to

- (i) preliminary examination into novelty,
- (ii) compulsory working,
- (iii) forfeiture or discontinuance on the ground of revocation, or
- (iv) importation of patented articles by the patentee.

Sierra Leone.—There is no statutory patent law.

Straits Settlements (No. 12 of 1871).—There is no express provision for a preliminary examination into novelty, but under s. 8 the Governor may refer a petition for leave to file a specification "to any person or persons for enquiry and report," and may refuse to make an order "in any case in which it may appear to him that the granting of exclusive privileges would be prejudicial to the public interests or of doubtful public utility." Under s. 24 the Governor in Council may, by notification in the Government *Gazette*, determine a patent if, *inter alia*, either it or the mode in which it is exercised is mischievous to the State or generally prejudicial. There are provisions (ss. 31-34) similar to those set out above under BRITISH INDIA for an application to the Supreme Court to declare an exclusive privilege not to have been acquired on the ground, *inter alia*, of lack of novelty.

Tasmania (No. 6 of 1893).—There is no preliminary examination into

Letters Patent may be issued in the form contained in the fifth Schedule of the Patent Law with the following additional clauses (*here set them out, if any*)."

novelty in the ordinary sense of the term (see s. 12). But the Registrar may refuse to grant a patent *if he knows* that the invention is not new (s. 110). There are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) importation of patented articles by the patentee ;

but compulsory licences may be ordered by the Governor in Council (s. 36, a transcript of s. 22 of the Imperial Act).

Trinidad and Tobago (No. 40 of 1894 ; No. 11 of 1897).—There is no preliminary examination into novelty, and there are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) the importation of patented articles by the patentee ;

but the Supreme Court may order compulsory licences to be granted (No. 40 of 1894, s. 14, a transcript of s. 22 of the Imperial Act).

Turk's and Caicos Islands.—See JAMAICA (*sup.*).

Windward Islands :

Barbados.—See BARBADOS (*sup.*).

Grenada (No. 4 of 1898).—There is no preliminary examination into novelty. There are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) the importation of patented articles by the patentee ;

but compulsory licences may be ordered by the Supreme Court (s. 32, a transcript of s. 22 of the Imperial Act).

St. Lucia (No. 14 of 1899).—There is no preliminary examination into novelty, and there are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) importation of patented articles by the patentee ;

but compulsory licences may be ordered (s. 33, a transcript of s. 22 of the Imperial Act).

St. Vincent (No. 5 of 1898).—There is no preliminary examination into novelty, and there are no provisions as to

- (i) compulsory working,
- (ii) forfeiture or revocation on the ground of discontinuance, or
- (iii) importation of patented articles by the patentee ;

but compulsory licences may be ordered by the Supreme Court (s. 32, a transcript of s. 22 of the Imperial Act).

III.—FOREIGN COUNTRIES.

Algeria.—The French Law of July 5, 1844 (see FRANCE, *inf.*), applies. (Decree of June 5, 1850, Art. 1).

Argentine Republic (Law of October 11, 1864).—There is a preliminary examination into novelty by the Commissioner and sub-Commissioners (see Arts. 4, 13, and 20), with an appeal against the refusal of a patent to the Ministry of the Interior (Art. 25). A patent lapses if the invention which forms its subject is not worked within two years from the date of its issue, or if the working is interrupted for a like space of time, except in case of *force majeure* or excuse accepted by the Patent Office (Art. 47). No judicial declaration of lapsing is necessary to make the patented invention public property (Art. 49); but if the patentee disputes the fact, summary application may be made to the Court for such a declaration (see Arts. 50-52). There is no prohibition of the importation of patented goods by the patentee. Provision is made for compulsory licences (Arts. 29-31).

Austria (Law of January 11, 1897, promulgated January 28, 1897, came into force January 1, 1899).—The new Austrian Law bears a strong resemblance to that of GERMANY, *inf.* The application is submitted to a preliminary examination by a member of the Application Department (Art. 55)—a department of the Patent Office formed to deal, *inter alia*, with such matters (Art. 36). If the examination, which may be made with the assistance of experts, shows that there is obviously no patentable invention, the applicant (who may be summoned and heard by the Examiner) is informed of the fact, and the grounds of the Examiner's view, and is requested to reply to these within a specified time. After receiving such reply, or after the expiration of the prescribed time without any reply, the Application Department itself decides the question (Art. 55). The President of the Patent Office has the right to make rules as to the principles on which the preliminary examination is to be conducted, and in these rules special emphasis is to be placed on the fact that no decision on the *value* of an invention is to be given on the preliminary examination (*ib.*). An appeal lies to an Appeal Department of the Patent Office (no member of which has taken part in the decision appealed against), whose judgment apparently is final (see Art. 39). The refusal of the patent is to be published. A patent (other than a Government or War Office one) may be wholly or partially withdrawn if the patentee fail to work the invention for which it is granted, or allow it to be worked in Austria to a suitable extent or to do everything necessary to secure such working

- (a) within three years from the date of the publication of the grant in the *Patent Journal*, or
- (b) at an earlier time if the patentee is working the invention abroad and satisfying the Austrian demand mainly by importation (s. 27).

Where a patented invention of commercial importance cannot be utilised without using an invention protected by a prior patent of at least three years' standing directly connected with it, the owner of the former may obtain a compulsory licence from the owner of the latter, who is entitled in turn to a compulsory licence to use the later invention. Besides such mutual compulsory licences, compulsory licences of the ordinary type may be obtained after three years (Art. 21). The proceedings are taken in the Annulment Department of the Patent Office (Art. 36 [3]), subject to an appeal to the Patent Court at Vienna (Arts. 39, 41).

Belgium (Law of May 24, 1854).—Patents are granted, as in France, without previous examination at the risk and peril of the applicants, and without guarantee either of the reality, or of the novelty, or of the merit of the invention (Art. 2). The invention must be worked in Belgium within one year (unless the Government grants an extension of time not exceeding one year) from the commencement of working abroad on pain of annulment by royal decree. The patent is also liable to be annulled when the invention being worked abroad has ceased to be worked in Belgium during a year, unless the patentee justifies the cause of his inaction (Art. 23). There are no provisions as to compulsory licences or prohibiting the importation of patented articles by the patentee.

Bolivia (Law of May 8, 1858).—The question of novelty might apparently be enquired into under Articles 10-17, although there is no express provision on the subject in these articles. But the patent itself states that the Government does not guarantee the reality, the merit, or utility of the invention, and that these matters are at the risk of the patentee (Art. 18). The patent lapses if the patentee allows a year and a day to elapse after the date of his patent without having put the invention into complete practice, unless he excuses his omission on justifiable grounds (Art. 38 [4]). There are no provisions for revocation or forfeiture on the ground of discontinuance of working or prohibiting importation by the patentee of patented articles. The State may buy the secret of any invention useful to industry for the general benefit (Art. 4).

Brazil (Law of October 14, 1882).—A patent may be refused if it appear that the invention does not offer practical results (cp. Art. 2, s. 2, with Art. 3, s. 2). An appeal lies from such refusal to the Council of State (Art. 3, s. 2). With the exception just noted, patents are issued without previous examination, and are expressed to be granted without guarantee of the Government as to novelty or utility (Art. 3, s. 3). The patent lapses

- (i) if the patentee does not make effective use of the invention within three years counting from the date of the patent ;
- (ii) if the patentee suspends the effective use of the invention for more than one year, except by reason of *force majeure*, admitted by the Government after consulting the Council of State.

By "use" in (i) and (ii) is understood the effective exercise of the patented industry and the supply of the products in proportion to their employment or consumption. The Government, on proof that the supply is insufficient for these requirements, can restrict the privilege to an area fixed by a decree made with the approval of the Legislature (Art. 5, s. 2 [2]). In connection with this last point, it may be mentioned that if during the term of the privilege the free use, or exclusive use, by the State of an invention should appear to be necessary in the public interest, the patent may be expropriated (Art. 1, s. 4). The lapse of patents is declared by the Minister of Commerce, with an appeal to the Council of State (Art. 5, s. 4). There is no prohibition of the importation of patented articles by the patentee.

Chili (Laws of September 9, 1840; August 1, 1851; July 25, 1872; January 26, 1888).—There is a preliminary examination into novelty (1840, Art. 2) and utility (Law of August 1, 1851) by the General Direction of Public Works, who have power to appoint experts if necessary (1888, Art. 9). A term is fixed for the establishment of the invention, and on the expiration of that period the privilege commences to run (1840, Art. 14), or lapses if the invention has not then been established (*ib.*, Art. 15). The privilege also lapses if, after establishment, the work of the invention is abandoned for more than one year (*ib.*, Art. 15). There are no provisions as to compulsory licences or prohibiting the importation of patented articles by the patentee.

Colombia (No. 35, of May 13, 1869).—Patents are granted without preliminary examination as to utility or novelty, and neither of these qualities is guaranteed (Art. 7). The patent lapses whenever a whole year passes without its being worked, except in the case of fortuitous circumstances and *force majeure* (Art. 12). There are no provisions as to compulsory licences or prohibiting the importation of patented articles by the patentee.

Congo (Law of October 29, 1886; Decree of October 30, 1886).—There is no preliminary examination into novelty or utility (Law of October 29, 1886, Art. 2), and the patent expressly states this fact, and also that the grant is made without guarantee of novelty or utility (Decree of October 30, 1886, Art. 5). There are no provisions as to compulsory working or prohibiting the importation of patented articles by the patentee.

Costa Rica (Law of June 26, 1896).—There is no preliminary examination into novelty, and there are no provisions as to compulsory working or prohibiting the importation of patented articles by the patentee. A patent which ceases to be worked during three consecutive years becomes public property (Art. 67), and the same result follows when two years have passed, counting from the date of registration, without the invention being put into practice (Art. 66).

Denmark (Law of March 28, 1894).—There is a preliminary examination

into novelty and utility (cp. Art. 2, s. 15 with Art. 1, s. 1) by the Patent Commission. If the Commission takes an adverse view of the invention in regard to novelty or utility, it gives the applicant an opportunity of making a verbal or written explanation, and if it is clearly of its first opinion, the application is rejected (Art. 2, s. 15). Within six weeks after the Patent Commission has communicated this fact to the applicant, he may lodge a request (accompanied by a more detailed explanation) for a reconsideration of his case by the Commission, and if the result of such reconsideration is still unfavourable to his claim, he may, within four weeks after the Patent Commission has communicated its decision to him, lodge with the Minister of the Interior a demand to have the case examined by a special Commission consisting of a president and four other members, appointed by the Minister of the Interior, with special reference to the nature of the case. With this request the applicant forwards a fee of one hundred kroner, which is repaid to him if the decision of the Patent Commission is not confirmed (Art. 2, s. 19). The patent lapses if it is not carried out in Denmark within three years from the date of its issue, or if its working is discontinued for more than a year. In either case, however, the time may be extended by the Patent Commission if it is shown that circumstances for which the patentee cannot be held accountable have prevented the working or caused the discontinuance. The Patent Commission may release the patentee from the obligation of manufacturing the patented articles in Denmark if

- (a) the cost of such manufacture is shown to be out of reasonable proportion to the home consumption, and
- (b) the patentee takes care that the patented article is always kept on sale in Denmark (Art. 3, s. 23 [4]).

There are no provisions as to compulsory licences or prohibiting the importation of patented articles by the patentee.

Ecuador (Law of October 18, 1880).—This Law is practically identical with the Law of BOLIVIA (*q.v.*), the provisions of which, on the points under discussion, are summarised (*sup.*)

Finland (Ordinance of January 21, 1898).—There is a preliminary examination into novelty to this extent—that the Industrial Board may refuse to patent an invention which is evidently not new (c. 2, s. 7). The applicant may appeal within sixty days of the date of an adverse decision to the Economy Department of the Senate; and if the appeal involves a technical question, the Senate may have the matter examined by experts (s. 13). If the invention has not been brought into practice in Finland to any considerable extent within three years from its date, or if the working of the invention is discontinued after that time, the holder of the patent must grant licences to other persons to use it (c. 3, s. 18, and cp. s. 4 of an Ordinance of the same date, January 21, 1898). If the invention has not been utilised to any considerable extent in Finland, but

on the other hand has been exercised abroad, the patentee must provide a home supply so far as is practicable, and at a reasonable price. If he fail to do this, the patent may be forfeited (c. 3, s. 18). A patent may be appropriated by the State for its exclusive use or the free use of the public on payment of reasonable compensation to the patentee (c. 5, s. 30, and cp. s. 3 of the Ordinance of January 21, 1898). S. 4 of the last-named Ordinance also provides for compulsory licences (a) under circumstances similar to those contemplated by s. 22 of our own Imperial Act, and (b) as under Austrian law (*v. AUSTRIA, sup.*), where the patent is a bar to use of an allied invention of great importance, the owner of the earlier patent being entitled in turn to a licence to use the later invention. There is no prohibition of the importation of patented articles by the patentee.

France (Law of July 5, 1844).—Articles are granted without preliminary examinations into, or guarantee of, novelty or utility, at the risk and peril of the applicant (Art. 11), and a patentee who mentions his title as patentee without adding the words "*Sans garantie du Gouvernement*" incurs liability to a fine of from fifty to a thousand francs (Art. 33). In practice, the initial letters *S.G.D.G.* are almost universally used, although it has been held that such use constitutes a violation of the law. A patent is liable to forfeiture

- (a) if the patented invention is not worked in France within two years from the date of the signature of the patent, or if the working ceases for two consecutive years, unless in either case the patentee can show good cause for his inaction ;
- (b) if the patentee imports into France articles made abroad similar to those protected by his patent (Art. 32 [2, 3]).

But (Law of May 31, 1856) the Minister of Commerce, Agriculture, and Public Works may authorise the introduction

- (i) of models of machines,
- (ii) of articles made abroad intended for public exhibitions, or for trials made with the consent of the Government.

As regards (a), it may be observed that the French Courts are not rigorous in their requirements as to what constitutes "working." While the law insists that there shall be a real working, the working of one mode of procedure where the patent comprised several, the construction of a machine, though the machine constructed was not sold, and the granting of a licence or the obtaining of a medal at an exhibition have each been held sufficient to satisfy its provisions. So too, illness, want of capital, and change in the public taste may be sufficient to justify a patentee's inaction (see Barclay's *French Law of Patents*, p. 55, and Goirand's *French Commercial Law*, 2nd ed., p. 474). As regards (b), it should be noted that the prohibition of importation no longer applies to States coming within the International Union for the Protection of Industrial Property; but the patentee remains bound to "work" his patent in conformity with the laws of the country into which he introduces the patented article (Art. 5).

Germany (Law of April 7, 1891).—An invention is not considered novel if, at the date of the application for a patent, it has already been so described in printed publications of the last hundred years, or has been so publicly used within the realm, that its use by other experts appears possible (s. 2). There is a preliminary examination (see AUSTRIA, *sup.*) by a member of the Application Department of the Patent Office. If the result of the examination is adverse to the applicant on the point of novelty, the fact, with the grounds of the adverse opinion, is notified to him, and he is requested to reply within a specified time. If he fails to do this, the application is treated as withdrawn; if he complies with the request, the Application Department comes to a decision (s. 21), in which the member who gave the preliminary decision takes no part (s. 22). If the patent is still refused, the applicant can appeal within a month from the date of notification of the fact to the Appeal Department (s. 26, and cp. s. 14). A patent is liable to be revoked at the end of three years from the date of the official publication of the grant

- (a) if the patentee has not brought the invention into practice within the realm, or at least done all in his power to ensure that result;
- (b) if the grant of licences appears desirable in the public interest, and the patentee declines to grant them on reasonable terms (s. 11).

It seems that applications under this latter head are rare. There is no provision for forfeiture on the ground of discontinuance, and the importation of patented articles by the patentee is not prohibited.

Greece.—There is no general statute law in Greece.

Guatemala (Law of May 21, 1886; Decree of December 17, 1897).—There is a preliminary examination, *inter alia*, into the question of the advantages or disadvantages [*of the invention*], both in relation to industry and also in relation to safety and health (Decree of December 17, 1897, Art. 16). A patent lapses

- (a) if the invention is not put into practice for a year, or
- (b) if there is a year's discontinuance of its working (*ib.*, Art. 8).

There is no prohibition of importation of patented articles by the patentee, and no provision is made for compulsory licences.

Hawaiian Islands (Civ. Code, ss. 255, 256, Law of August 29, 1884).—There is a preliminary examination into both novelty and utility (1884, s. 6). There are no provisions as to compulsory working, forfeiture or revocation on the ground of discontinuance, compulsory licences, or prohibiting the importation of patented articles by the patentee.

Hungary (Law of July 7, 1895).—An invention is regarded as new, notwithstanding publication or working, if between its last publication or working and the application for a patent a term of one hundred years has elapsed (s. 3). Whether an official publication in a foreign State deprives an invention of novelty is a matter to be determined by treaties with foreign

States (ss. 3,16). The novelty of the invention is not officially made the subject of examination or decision (s. 33). A patent may be withdrawn or revoked as a whole or in part

- (i) if the patentee neglects to work or use his invention within the countries of the Hungarian Crown, in substance and to an adequate extent, or if he has interrupted such working or use, or if he has not done all that is necessary according to his own and the country's circumstances and conditions for securing and continuing such working

(ordinarily such withdrawal or revocation cannot take place until three years after the publication of the grant of the patent, but it may take place earlier if the home supply is not met or licences are not granted) ;

- (ii) if the patentee, after three years from the date of the patent, fails to work his invention adequately or to grant licences on suitable terms.

A patent granted to the State cannot be withdrawn or revoked (s. 20). There is no prohibition of the importation of patented articles by the patentee.

Italy (Law of January 31, 1864, extending Sardinian Law of October 30, 1859, to the whole Kingdom of Italy).—There is no preliminary examination into novelty. The period for compulsory working or for discontinuance, which is fatal to the validity of the patent, is one year if the patent is granted for five years or less, two years if granted for more than five years. In neither case does annulment ensue if the inaction arises from causes beyond the control of the patentee ; but want of pecuniary means is not included among these causes (Art. 58). There is no provision for compulsory licences, and the importation of patented articles by the patentee is not prohibited.

Japan (Law of July 16, 1899).—*Seem*, there is a preliminary examination into novelty. Forfeiture ensues if the patentee fails to work his invention within three years of the date of the certificate of grant, or if, having discontinued for three years, he refuses a reasonable request by a third party for an assignment or licence.

Liberia (Act of December 23, 1864).—There is a preliminary examination into novelty (s. 4). An invention patented by an alien must be brought into active operation in the Republic within three years from its date, refusal or neglect to comply with this provision being regarded as an abandonment of the invention to the public (s. 6). There are no provisions as to forfeiture or revocation on the ground of discontinuance, compulsory licences, or prohibiting the importation of patented articles by the patentee.

Luxembourg (Law of June 30, 1880).—There is no preliminary examination into novelty, and patents are granted without guarantee by the Government (Art. 12). A patent may be withdrawn after three years if

the patentee neglects to work his invention in the Grand Duchy to a suitable extent, or at least to do all that is necessary to secure its working (Art. 18). Similarly, compulsory licences may be declared after three years (*ib.*). There is no prohibition of importation of patented articles by the patentee.

Mexico (Law of June 7, 1890).—There is no preliminary examination into novelty or utility, and patents are granted without guarantee on either of these points (Art. 5). There are no provisions as to compulsory working or prohibiting the importation of patented articles by the patentee. But patents may be expropriated on terms

- (i) when the patentee refuses to permit the working of his patent ;
- (ii) when the machine, apparatus, instrument, or process is capable of being (and, *semble*, is not) produced or applied in Mexico (Art. 15).

Mysore (Reg. No. 11 of 1894).—The provisions of this Regulation are substantially identical with those of the Patent Law of BRITISH INDIA (*q.v.*).

Nagri Sembelan (Order in Council No. 4 of 1896).—There is a preliminary examination into novelty on a reference by the British Resident (s. 6). The exclusive privilege may be determined if it is being exercised in a manner mischievous to the State and generally prejudicial to the public (s. 15), and compulsory licences may be ordered (s. 16, which is practically identical with s. 22 of the Imperial Act). There is no prohibition of the importation of patented articles by the patentee.

Nicaragua.—There is no general statutory patent law.

Norway (Law of June 16, 1885).—If the invention forming the subject of the application is evidently not new, the application may be rejected (s. 16). A patent may be judicially revoked if the invention is not worked, or the patented articles are not put on sale, in Norway within three years, or if such working or putting on sale is discontinued for a year. But this last-mentioned term may be extended by the Patent Commission if the discontinuance is proved to have been due to an accidental occurrence. In exceptional cases the Patent Commission may define the special requirements as to what will be considered sufficient working or putting on sale (s. 27). Compulsory licences may be ordered (s. 9). There is no prohibition of the importation of patented articles by the patentee.

Orange River Colony.—The law of the Orange Free State was regulated by Ordinance No. 10 of 1888. There were no preliminary examinations into novelty, no provision for compulsory working, or forfeiture or revocation on the ground of discontinuance, and no prohibition of the importation of patented articles by the patentee. Compulsory licences might be ordered (Art. 21, practically identical with s. 22 of the Imperial Act).

Perak (Order in Council No. 2 of 1896).—There is a preliminary examination into novelty on a reference by the British Resident (s. 6). There are no provisions as to compulsory working or forfeiture or revocation on the ground of discontinuance. The exclusive privilege may be determined if the manner

in which it is exercised is mischievous to the State or generally prejudicial to the public (s. 15). Compulsory licences may be ordered (s. 16, which is practically identical with s. 22 of the Imperial Act).

Peru (Laws of January 28, 1869, and January 3, 1896).—There is no express provision for a preliminary examination into novelty. But, *semble*, one might be ordered under 1869, Arts. 9 and 10, and 1896, Art. 4. But the Government does not guarantee the novelty or utility of the invention (1896, Art. 3). Forfeiture is entailed

- (i) by failure to work the invention within two years or the period stipulated in the privilege;
- (ii) by importation of articles manufactured in a foreign country similar to those protected by the patent, except models of machinery whose importation is authorised by the Government after investigation (1896, Art. 15).

Compulsory licences may be ordered under Art. 27 of the Constitution.

Portugal (Decree of December 15, 1894).—An invention is not considered new if it has been described in any publication within a hundred years (Art. 9). There is no preliminary examination into novelty, and patents are granted without guarantee as to their novelty or utility (Art. 12). A patent is forfeited

- (a) if not worked within two years from its date by manufacturing the patented articles in Portugal, or
- (b) if such working is discontinued for two consecutive years, unless the patentee can justify his inaction (Arts. 38 and 39).

The importation of patented articles by the patentee is not prohibited (Art. 38). There are no provisions as to compulsory licences.

Russia (Law of May 20, 1896).—There is a preliminary examination into novelty (but not into utility) by a Committee of the Department of Commerce (B. Art. 15, and cp. Art. 3), the applicant having a right of appeal within three months from a rejection of his application to the Department of Commerce (Art. 18), with the assistance of experts (Art. 19). The patentee must work his patent in Russia within five years from its date, and within the same period submit to the Department of Commerce a certificate of such working by a competent authority appointed by the Minister of Finance (Art. 24). There are no provisions as to the forfeiture or revocation of the patent on the ground of discontinuance, or as to compulsory licences, or prohibiting the importation of patented articles by the patentee.

Selangor (Reg V. of 1896).—The provisions are substantially identical with those summarised under PERAK (*sup.*).

South African Republic.—See TRANSVAAL (*inf.*).

Spain (Law of July 30, 1878).—There is no preliminary examination into, and no guarantee of, novelty or utility (Art. 11). A patent lapses

- (a) if not proved before the Director of the Conservatory of Arts to have been worked in Spanish territory within two years from its

date (a term which can be prolonged for six months and not more)

(in this case the lapsing is declared by the Minister of Commerce, on the previous advice of the Director of the Conservatory of Arts, and an appeal lies to the Judicial Committee of the Council of State);

(b) on discontinuance of working for a year and a day, unless due to *force majeure*.

Here the lapsing must be judicially declared by the Courts on the application of an interested party (Arts. 38, 46, 47). There are no provisions as to compulsory licences, and the importation of patented articles by the patentee is not prohibited.

Sweden (Laws of May 16, 1884, and March 26, 1897).—There is a preliminary examination into novelty, and if the invention is evidently not new, the application is to be rejected (1884, s. 6), the applicant having a right of appeal to the King "before twelve o'clock on the sixtieth day after the date of the decision" (*ib.*, s. 8). The patent must be worked within Sweden to an adequate extent within three years (which may be prolonged by the patent authorities to four years) from its date. The patent authorities may, in exceptional cases, determine what measures taken by the patentee will constitute a sufficient working (s. 15). Discontinuance of working for a year forfeits the patent (*ib.*) Importation of patented articles by the patentee is not prohibited. The patented invention may be appropriated for the use of the public or of the State on terms, the compensation, if it cannot be agreed upon, being fixed by a special jury appointed by the Court according to the law governing the seizure of land or homesteads for public purposes (s. 17).

Switzerland (Laws of June 29, 1888, and March 23, 1893).—There is a preliminary examination into novelty (1888, Art. 17), but no guarantee of novelty (*ib.*, Art. 18). The patent is forfeited

(a) if the invention is not in any way carried out in practice at the expiration of the third year from the date of the patent;

(b) if the patentee imports the patented articles while refusing application on equitable terms for Swiss licences. The forfeiture is in each case declared by the tribunal having jurisdiction in infringement cases on the application of a party proving that he is interested (Art. 30).

Mutual compulsory licences may be ordered as in AUSTRIA (*sup.*, and see Art. 12). There is no provision as to forfeiture on the ground of discontinuance.

Transvaal.—The law was regulated by No. 10 of 1899. There was no preliminary examination into novelty, and no provision was made for compulsory working, or forfeiture on the ground of discontinuance, or the prohibition of the importation of patented articles by the patentee. But compulsory licences might be ordered (Art. 27, which was practically identical with s. 22 of the Imperial Act).

Tunis (Law of December 26, 1888).—There is no preliminary examination into novelty, and (Art. 9) patents are granted at the risk of the applicant, and without guarantee of novelty or utility. Forfeiture ensues on

(a) failure by the patentee to work his invention in Tunis within two years, or discontinuance of such working for two consecutive years, unless in either case the inaction is justified ;

(b) importation of patented articles by the patentee ;

but, as in France, the introduction may be authorised

(i) of models of machines,

(ii) of articles made abroad for public exhibitions, or for trials made with the consent of the Government (Art. 26).

There is no provision for compulsory licences.

Turkey (Law of March 2, 1880).—There is no preliminary examination into, or guarantee of, novelty or utility (Art. 11), and if a patentee mentions his title as such without adding the words "Without guarantee of the Government," he incurs a liability to a fine of from two to forty-five Turkish pounds (Art. 39). The provisions (Art. 38) as to compulsory working, forfeiture for discontinuance, and prohibiting importation are substantially identical with those stated *sup.* under FRANCE and TUNIS. There is no provision as to compulsory licences.

United States (Revised Statutes, Tit. xi., Act of March 3, 1897).—There is a preliminary examination into novelty (Rev. Stats., ss. 4893, 4903), the applicant having a right of appeal from the decision

(i) of the primary Examiner to the Examiners in Chief (s. 4909) ;

(ii) from the Examiners in Chief to the Commissioner in person (s. 4910) ;

(iii) from the Commissioner to the Supreme Court of the District of Columbia sitting in Court (s. 4911-13).

If the patent is refused by either the Commissioner or, on appeal from him, by the Supreme Court of the District of Columbia, the applicant has still a remedy by a bill in equity (s. 4915) to the Circuit Court (s. 629 [9]). There are no provisions as to compulsory working, forfeiture on the ground of discontinuance, importation of patented articles by the patentee, or compulsory licences.

Uruguay (Law of November 12, 1885).—There is no preliminary examination into, or guarantee of, novelty (Art. 6). The period for compulsory working is fixed by the Executive (Art. 11), and may be extended by the Legislature in cases of delay caused by *force majeure* (Art. 13). Forfeiture ensues on failure to work the invention within the prescribed period, or (except in case of *force majeure*) on discontinuance of such working for a year (Art. 36). Importation of patented articles by the patentee is not prohibited. A grant in the nature of compulsory licence may be ordered, as against strangers obtaining certificates of addition, in favour of the first inventor, who may elect, however, to take a premium instead (Arts. 29 and 30).¹

Venezuela (Law of May 25, 1882).—There is no preliminary examination into, and no guarantee of, utility or novelty (Arts. 3 and 11). The patent lapses if not put into practice within a period fixed by the grant (Arts. 8, 23 [1]), or if the working is discontinued for more than a year (Art. 23, [2], and see further Art. 18). Importation of patented articles by the patentee is not prohibited, and there is no provision for compulsory licences.

IV.—CONCLUDING OBSERVATIONS.

The following points appear to be worthy of notice in connection with the foregoing summary :—

- (i) A preliminary examination into novelty or utility never involves *any guarantee* on the part of the State that a patent is novel or useful as against third parties. In many cases (see *e.g., sup.*, ALGERIA, BELGIUM, BOLIVIA, BRAZIL, FRANCE, RUSSIA, SWITZERLAND) such a guarantee is expressly disclaimed.
- (ii) In some cases, in spite of a disclaimer of any guarantee, there is, or may be, a preliminary examination as to novelty (see *sup.*, BRAZIL, BOLIVIA).
- (iii) In some cases there are general clauses under which a preliminary examination into novelty might be held (see *sup.*, BOLIVIA, PERU).
- (iv) In certain countries (*e.g.*, FRANCE, TURKEY, TUNIS, *sup.*) a patentee, if he mentions his title as such, must add to it the words "*Sans garantie du Gouvernement*" or their equivalents.
- (v) In certain patent laws, applications for patents for obviously old inventions may be rejected (see *sup.*, NORWAY) and in others there are "unexplored remainders" under which such applications might be rejected.
- (vi) In most cases the State has power to "expropriate" a patent for its own use (a few typical instances of this power have been deemed sufficient), and in many cases (see, *e.g.*, SWEDEN, *sup.*) a similar power exists of expropriation for the free use of the public.
- (vii) Compulsory licences on the lines of s. 22 of the Imperial Act are very common in the colonies (see, *e.g., sup.*, CEYLON, HONG-KONG, MALTA), and are to be found also, with modifications, in foreign countries (see, *e.g., sup.*, ARGENTINE REPUBLIC, FINLAND). Provision is also made for mutual compulsory licences (meeting Clause (c) of s. 22 of the Imperial Act ; *vide ante*, p. 294) in some cases (see *sup.*, AUSTRIA, FINLAND).
- (viii) Compulsory working is prescribed in most Continental countries and in some of the colonies (see *sup.*, AUSTRIA, BELGIUM, CANADA, FRANCE). It is usually linked with a prohibition for discontinuance of working for more than a specified period. The modern tendency is to interpret these provisions liberally (see *sup.*,

FRANCE), and any severely literal construction of them would probably lead to retaliatory measures.

- (ix) The importation of patented articles by the patentee is prohibited sometimes (as in FRANCE, TUNIS, TURKEY, *sup.*) absolutely (with the exception of models, etc.) under pain of forfeiture, sometimes (see SWITZERLAND, *sup.*) where the patentee fails to grant home licences on reasonable terms.
- (x) In certain cases, "ancient anticipations" are limited. Thus in HUNGARY (*q.v.*) an invention is regarded as new, notwithstanding publication or working, if between the last publication or working and the application for a patent a term of one hundred years has elapsed (see also PORTUGAL, *sup.*). A Bill introduced into the English Parliament in 1895 by the present Master of the Rolls (Lord Alverstone), Mr. Fletcher Moulton, Q.C., M.P., and Mr. R. B. Haldane, Q.C., M.P., proposed a limit of fifty years.

NOBILITY IN ENGLAND.

[Contributed by EDWARD MANSON, ESQ.]

Types of Nobility.—Nearly all nations present us, in some stage of their development, with the spectacle of a privileged class enjoying a monopoly of wealth, of honours, and of political power. The origins of such a privileged class or caste are various. The class may owe its pre-eminence, as in the case of the patricians in early Rome, to the growth by its side of a new people—the plebs—unadmitted to privileges, or, as in the case of the later “nobiles,” to their ancestors having filled important offices of State—the *jus imaginum*. It may be a nobility of conquest, as in Sparta, or of wealth and office growing out of wealth, as in the seigniorship of Venice. It may be formed from a religious or priestly caste, as with the Brahmans of India. Among the Germans, nobility seems to have been derived from the ennobling quality of the land—a fact clearly recognised by the Anglo-Saxons in the institution of *wergild*.

The Nobility of Arms.—The effect of the feudal system in mediæval Europe was to introduce a nobility constituted on the basis of military service. Among those martial races which founded their kingdoms on the ruins of the Roman Empire, arms were esteemed the only proper title to honour. “In all examples of our Charters of ennobling,” says Selden (*Titles of Honour*), “arms are given as a perpetual and necessary concurrence with gentry.”¹ And this right to wear coat armour bestowed by the sovereign as the fountain of honour became accordingly the distinguishing badge of nobility, raising the gentleman to an eminency above the multitude—an eminency perpetually inherent in his person. In the letters of nobility were blazoned the arms which were to distinguish his shield; and by this shield he was to be known as “nobilis.” A plebeian had no blazonry on his shield because he was “ignobilis,” or unworthy of notice. The quarterings on a coat of arms showed with how many noble families the possessor was

¹ Thus in the letters of nobility granted by Henry VI. to Nicholas Cloos, the architect of King's College, Cambridge, and to Roger Keys, the architect of Eton College, the grant runs, “Nobilitamus nobilemque facimus et creamus,” and goes on, “in signum hujus nobilitatis arma et armorum signa damus et concedimus.” Lady Juliana Berners tells us in the *Boke of St. Albans* (1486) that “the iiij doctores of holi Church Seynt Jerom Ambrose Augustyn and Gregori war gentilmen of blode and of cot armures”: so ingrained was the association of ideas.

allied, how many strains of gentle blood ran in his veins. They corresponded closely to the long line of "imagines" to which the Roman noble pointed as the proof of his nobility. This nobility of arms created on the Continent a caste which boasted ennobled blood and the political privileges (immunity from taxation among them) which flowed from it, and held itself aloof in haughty isolation from the rest of the nation. No such caste with a divine ichor running in its veins has ever formed itself among us, and the fact is one of capital significance in our social and constitutional history. Not that good blood has not been recognised and respected in England from the earliest times to the latest: we still hold with Horace, "*Fortes creantur fortibus et bonis*"; but the belief in blood has never produced, happily for us, any deep division of classes—the social cleavage of the Continent. Why is this? Why is it that the ennoblement of blood never took the shape in England which it did in mediæval France or Germany?¹

The Peerage.—The deepest cause lies in that national character which is national destiny—the free, independent spirit and democratic temper of our race,—in this first, and next to it in the growth of an hereditary peerage, eclipsing by its superior splendour the lustre of the untitled gentry. It may seem at first sight as if the effect of this has been to create a noblesse very much the same as that of the Continent, substituting only a smaller class of titled nobility for the larger aristocracy of gentlemen by coat armour; and in a sense this is true, but it is by no means an adequate account of the matter. It does not give sufficient prominence to the fact that this class of gentlemen by coat armour—of untitled nobility—remained the most important element of the community, and carried with it into the ranks of the commoners of the kingdom all that is expressed in the idea of blood, and the qualities and virtues which it connotes;² nor does it mark the fact that the dignity of peerage is one of *hereditary office*, not of blood. The true idea of nobility is that when once acquired it shall go on for ever to all descendants, or at least to all the descendants in the male line of the person first ennobled. "It is impossible," as Dr. Stubbs says, "to regard blood as ennobled by law when the nobility of the blood is restricted to the bearer of the title and does not extend even to his own children." And this is the case with the peer. All the younger sons of peers are commoners. The eldest son, so long as his father lives, is only a commoner, though he is given by courtesy his father's second title.

¹ Thackeray could still in 1847 make merry over "those snug, unassuming, dear old operas in the German towns, where the noblesse sits and cries and knits stockings on the one side over against the bourgeoisie on the other."

² Blood, as used in popular language, sums up and typifies those bodily and mental qualities which the child inherits from its parents. Blood may be bastardised if not transmitted through lawful wedlock—"church marked," as Mr. O. Pike terms it. It may be, or it might be, corrupted by attainder of treason or felony, whereby every inheritable quality, "upwards and downwards," was blotted out; but these doctrines of corruption and bastardy had no special application to noble blood.

Even the heir-apparent to the Crown, the Prince of Wales, would be only a commoner but for the accident that he is born Duke of Cornwall (*dux natus, non creatus*).

Its Historical Origin.—This characteristic of hereditary office in the peer comes out more clearly if we glance at the historical origin of the peerage. Tacitus saw the Germanic chieftain (*princeps*) surrounded with brave and approved retainers—in *pace decus, in bello præsidium*—and gave to these retainers (*proceres*) the same name as that used to designate the retinue of the Roman Emperor (*comites*). In this body of *comites*, or rather in their mediæval equivalents, we have the beginnings of our English peerage, the feudal counts or earls and barons. When William the Conqueror made himself master of England these were the men, bound to him by ties of personal service, among whom he distributed his great fiefs (*feuda nobilia*), late the estates of the Saxon earls and thanes. These it was who became his “men” in the feudal sense, or barons—these whom, as tenants-in-chief of the Crown, he summoned to his Parliament at Westminster¹ to aid him with their counsel, or to meet him with a retinue of armed vassals (*armis et equis*) for some military enterprise. In the centuries succeeding the Conquest, the counsellors thus summoned were a large and fluctuating body; for upon feudal theory all the king’s tenants-in-chief were members of his Council. There were the temporal barons (summoned originally in virtue of their baronies), the prelates, the archbishops, bishops, abbots, and priors, often the justices of both Benches, the barons of the Exchequer and *clerici de consilio*, besides sundry others, who, as Dugdale says, “for their prudence, military valour, and loyalty were esteemed worthy counsellors.” These in themselves were numerous, and their numbers were largely and inconveniently increased by forfeitures and escheats, and especially by the operation of that masterpiece of statecraft, the Statute *Quia Emptores*. Accordingly it became customary in practice to send special summonses (*propriis nominibus*) to the greater tenants only, the minor tenants receiving through the sheriff a general summons merely to the Council and the host.

The Peer an Hereditary Counsellor.—It was these greater tenants (*maiores barones*) who came to constitute the peerage of the thirteenth century; and they derived their title of “pares,” or peers, from the fact that they were, by virtue of the special writ of summons addressed to them, placed on an equality *inter se*, the only distinction among them being one of precedence. The choice of those to receive a special writ of summons rested with the Crown, subject only to any rule of hereditary right; and thus the true and only test of peerage, prior to the creation of peers by letters patent,² came to be the title to receive, as of right accustomed,

¹ *Report on the Dignity of a Peer of the Realm*, i. 85.

² The first temporal baron created by letters patent was John de Beauchamp, Steward of the Household to Richard II.

a special summons *nominatim* from the king to the National Council. The peer is simply an hereditary counsellor of the Crown, and it is in this capacity—not as a baron by tenure, not as a noble by blood, not as the bearer of a title of honour—but as a counsellor of the Crown that he takes his seat in the House of Lords. This appears plainly from the terms of the writ. Take as a typical instance the special writ of summons issued by Edward I., in the twenty-third year of his reign, to the Earl of Lancaster. It runs as follows :

Form of the Writ.—"Rex dilecto et fideli suo Edmundo Fratri suo Comiti Lancastrico salutem. Quia super quibusdam arduis negotiis nos et Regnum nostrum ac vos cæterosque Proceres et magnates de eodem Regno quæ sine vestra et eorum præsentia nolumus experiri Parliamentum Nostrum tenere et vobiscum super hiis colloquium habere volumus et tractatum vobis mandamus in fide et dilectione quibus nobis tenemini firmiter injungentes quatenus sitis ad nos apud Westm. primo die Mensis Augusti proximo futuro vel saltem infra tertiam diem subsequentem ad ultimum nobiscum super dictis negotiis tractaturi et vestrum Consilium impensuri et hoc nullo modo omittatis. Teste meipso apud Album Monasterium xxiii die Junii Anno Regni nostri xxiii." ¹

Here we have the official origin and true function of the peer ; and it was to facilitate this proper function that the number of those summoned was limited to the most powerful and influential of the barons. A large mixed and tumultuary assemblage was not any more conducive to the transaction of business in the feudal period than it is to-day. Other circumstances combined to reduce still further the number of those summoned. Thus on the occasion when the above-cited writ was issued (23 Ed. I.) sixty-three other earls and barons, as well as the Earl of Lancaster, were summoned, besides archbishops, bishops, abbots, and priors. In the first year of Henry IV., at the beginning of the Wars of the Roses, the peers summoned to Parliament were forty-nine. In the first year of Henry VII., after the close of the Wars of the Roses, so thinned were the ranks of the barons by battle and attainder that only twenty-eight or twenty-nine were summoned to the National Council. The reduction in numbers brought about in these ways had an indirect effect of no little importance : it helped to enhance the dignity of the peerage, to accentuate its pre-eminence.

Increasing Splendour of the Peerage.—Another cause tending to the same result was the creation of new orders of precedence among the peers, distinguished by corresponding titles of honour, or, in the language of the law, dignities. Duke was introduced as a new order in the eleventh year of Edward III., taking precedence of the older dignities of earl and baron—a precedence yielded to it owing, seemingly, to the circumstance that the first dukes were of royal blood—the Duke of Cornwall, the Duke of Lancaster, the Duke of York, and the Duke of Gloucester. It is plain, at all

¹ Dugdale, "Summons to Parliament," 8.

events, that the peers were by this time jealous of their position and privileges ; for when Richard II. created Robert de Vere Marquis of Dublin, though only for life, and assigned him his seat in Parliament below the dukes and above the earls, the earls highly resented the novel dignity (*"nova dignitas Anglicis insueta"* Selden,¹) : and in deference to the same strong feeling on the subject, the Earl of Dorset, who in the same reign had had the dignity of marquis conferred on him by the king, declined the title. It was not till the reign of Edward VI. that the title of marquis established itself. The dignity of viscount, ranking between that of earl and baron, was introduced by Henry VI., the recipient of the honour being John Lord Beaumont.²

Eclipse of the Untitled Nobility.—The creation of these various illustrious orders in the peerage, the hereditary nature of the dignities, the cumulative titles and honours borne by many of the peers, the appellation "my lord," and other deferential styles of address, the courtesy titles given to the children of peers, the splendid robes, coronets, and other insignia with which the orders of the peerage are invested,—all these have contributed to enhance the dignity of the peer, while obscuring his true character of hereditary counsellor, and to cast a glamour round those families whose heads are entitled to a seat in the gilded chamber, to the disparagement of the untitled gentry. "The hereditary dignity of the peer," as Professor Freeman says, "the great political position which it carries with it, stands so immeasurably above any hereditary dignity which attaches to the simple gentleman by coat armour, that the gentleman by coat armour—the noble of other lands—has ceased in England to be looked on as noble at all." Countless families which would be reckoned as noble anywhere else are not reckoned as noble in England. They may be rich and ancient, they may claim an illustrious pedigree, and may be able to prove their claim, yet, not being peers, they are gentle only, not noble, in our English use of the term.

Its Beneficial Results.—But note the inestimable benefits which have accrued to the nation at large from the working of this—from the exaltation of the peerage at the expense of the true nobility of the realm—the gentlemen by coat armour. It levelled the barrier of pride and exclusiveness which in other countries hedged in the nobility. It brought over the gentlemen by coat armour—the knights of the shire—to the side of the people, and welded them into one. It high-mettled the blood of the great English middle class ; it gave them leaders and ideals. In the reign of Edward II. the temporal peers may be reckoned at fifty. In the same reign the number of gentlemen entitled to wear coat armour is computed by a writer on heraldry at nine hundred and forty-eight. For every peer who took his seat with the Lords there were thus nearly twenty gentlemen by coat armour

¹ *Titles of Honour*, p. 628.

² It is worthy of observation that duke, marquis, earl or count, and viscount were all originally titles of *office*.

whose valour, wealth, and ancient lineage went to ennoble the ranks of the Commons of England, and to strengthen their cause.

The Knight in Chaucer.—The gentleman by coat armour, the knight of the shire, might bear no dazzling titles, but he was, even in England, a personage of high distinction and territorial influence—the peer of the Continental noble. He embodied, besides, an ideal of chivalrous manners and knightly honour, which was a perpetual pattern to his social inferiors. We may see this in the “verra perfect gentil knyghte” of Chaucer’s *Canterbury Tales*:

“That fro the tyme that he first began
To ryden out, he loved chivalrye,
Trouthe and honour, fredom and curteisye.”

But perhaps the most striking feature in Chaucer’s picture is the frank, social relations existing between the gentry of Edward III.’s time and the other orders of the people—the salutary intermingling of classes. Mine hoste and all the pilgrims treat the knight with the greatest respect, not only for his rank, but for his worthiness; yet this rank and social dignity do not prevent the knight mixing freely with the pilgrims of all degrees and telling his story like the rest of them—a story, by the way, of chivalry and noble deeds. He, just as the squire of our own day, was in close touch with his tenantry and neighbours of all degrees—much more so than the feudal baron; and it was this warm, wholesome contact with his fellow-men of every class which, concurring with the overshadowing pre-eminence of the peerage, made possible in England what would not have been possible on the Continent, the alliance of the gentlemen by coat armour with the Commons, the noblesse with the bourgeoisie.

Freedom in Marriage.—The same absence of caste feeling appears in the matter of marriage, in which more than in anything else in nobility-ridden countries “birth’s invidious bar” is wont to operate. It was thought no disparagement in England for one even of royal blood “to intermarry with a commoner. Thus when Joanna of Acre, the daughter of Edward I., was contracting a marriage with a plain knight, Ralph of Monthermer, of obscure extraction, one of the great barons who was present declared aloud, in the hearing of the princess’s royal father, that a marriage of such a kind was not consonant with his dignity, seeing that noblemen, counts, and barons were ready to espouse her: to which she answered, that there was no disgrace or dishonour in a great and powerful earl allying himself in marriage with a woman of no substance or state, and so neither was it blameworthy, nor was there any impediment to her marrying a vigorous young man (*strenuum juvenem*). The daughter of Thomas Mowbray, Duke of Norfolk, married Sir John Howard; and the Countess of Salisbury, the daughter of George, Duke of Clarence, married Sir Richard Cole. The great social gulf in early England was not that between the baron and knight and the Commons,

but between the free and the unfree, the eorl and ceorl of Saxon times.¹ "Our law," as Sir F. Pollock and Professor Maitland remark (*Hist. English Law*, i. 391), "hardly knows anything of a noble or of a gentle class. All free men are in the main equal before the law."

The Separation of the Houses in Parliament.—Politically the decisive moment was when the elements of Parliament settled themselves in the separation of the two Houses in Edward III.'s reign. In 1352 the Chapter House of Westminster Abbey became the chamber of the Commons; and the county members—the knights of the shire—took their seats side by side with the burgesses of the towns, a thing which would have been impossible in any other country in Europe, where gentlemen by coat armour ranked as nobles, and despised townsmen far too much to sit in the same House with them. Thenceforward they (the knights of the shire) were identified with the struggles and fortunes of the people, giving to the House of Commons a dignity, weight, and stability without which it would have been wholly incapable in a feudal England of defending the liberties of the people against king and barons.

"C'est la," remarks M. Guizot, "le grand fait qui a décidé la destinée politique de l'Angleterre. A eux seuls les députés des bourgs n'auraient jamais eu assez d'importance, assez de force, pour former une Chambre des Communes capable de résister tantôt au roi, tantôt aux hauts barons, et de conquérir sur les affaires publiques, une influence toujours croissante. Mais l'aristocratie ou plutôt la nation féodale s'étant coupée en deux, et la nation nouvelle qui se formait dans les villes s'étant fondue avec les franc-tenanciers des comtés, de là sortit une Chambre des Communes imposante et nécessaire. Il y eut un grand corps de nation indépendant et du roi et des grands seigneurs" (*Hist. des Origines du Gouvern. Rep.* ii. 276).

National Character.—It has been called a happy accident, this fusion of knights of the shire and burgesses in one assembly; but it is not happy accidents that determine the career of a nation. The fusion was the outcome in the main of national character working out its destiny; but among causes co-operant to the issue, one of the most potent was certainly the constitution of the peerage. Paradoxical as it may seem, it is the peerage which has saved us, in Professor Freeman's words, from "the curse of an hereditary nobility" of the Continental type, and which has consolidated the English people into one "noble and puissant nation."

¹ There is an old ballad—*Glasgerion*—which illustrates the sentiment. Glasgerion was a minstrel, though a lord's own son, and he harped so well before the king that he won the love of the young princess, his daughter. She tells him to come to her bower at night. The minstrel's page overhears the assignation, dresses himself in his master's clothes, and goes to the lady's bower, personating the lover. Later comes Glasgerion himself; the deception is discovered with tragic consequences, and the princess stabs herself, exclaiming passionately:

"A churle's blood shall ne'er defile
The daughter of a king."

THE SEIZURE OF THE *MASHONA*.

JUDGMENT OF THE PRIZE COURT.

THROUGH the courtesy of the Colonial Office we are enabled to give the following report of the judgment of the Prize Court in the case of the *Mashona*, which was seized by an English cruiser at Port Elizabeth during the war in South Africa. No complete report of the case, so far as we are aware, has appeared in this country; and a further reason for publishing the report is the fact that the *Mashona* is one of the few recent cases in which trading with the enemy and continuous voyages are discussed in English Courts.

THE QUEEN *v.* BUCKNALL BROS. AND OTHERS.

JUDGMENT was given in this case in the Prize Court.

The *Attorney-General* and *Mr. Searle*, Q.C., appeared for the captors; *Mr. Innes*, Q.C., and *Sir Henry Juta*, Q.C., were for the defendants.

DE VILLIERS, C.J. :

This is a suit for the condemnation of the British ship *Mashona* and a portion of her cargo as prize by reason of her having been engaged, at the time of her capture, in trading with the Queen's enemies. The cargo in question was shipped at New York for conveyance to Delagoa Bay, and was consigned to various persons resident in the South African Republic, with which State Great Britain was at war at the time of such shipment. There is no question of contraband or of the rights of neutrals, the simple question being whether, at the time of her capture at Port Elizabeth, the *Mashona*, which is admitted to be a British ship, was engaged in carrying cargo for, and trading with, the Queen's enemies.

The law is clear that one of the immediate consequences of the commencement of hostilities is the interdiction of all commercial intercourse between the subjects of the States at war without the licence of their respective Governments. "There can be no doubt," says Bynkershoek (*Qu. Jur. Pub.*, lib. 1, No. 3), "that from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such commerce, as is often the case, commerce is forbidden by the mere operation of the law of war." The prohibition applies to all persons domiciled within the hostile State. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and property to another country. If he does not avail himself of the opportunity, he is treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and

as an enemy of those with whom that Power is at war. In the present case the bills of lading show that several of the consignments were made to persons or companies domiciled or carrying on business in the Republic. For instance, on the margin of the bill of lading relating to twenty bales of duck for Messrs. A. Johnston & Co. there appears the word "Pretoria" over a diamond, within which are the initials "A. J. & Co., P." Another bill of lading shows a consignment of one thousand cases of lubricating oil direct to the Netherlands South African Railway Company. No claim has been made on behalf of that company, but the Netherlands consul has informed the Court that the company is domiciled in the Netherlands. Seeing, however, that it owns a railway in the Transvaal, and there carries on its main business as a railway company, it would be difficult to exclude lubricating oil, apparently intended for the use of its railways, from the operation of the rule already referred to. There appears to be some arrangement between the Governments of Great Britain and the Netherlands for the delivery to the British consul at Delagoa Bay of goods consigned to the company, and the Court will postpone judgment as to the liability of the consignment to confiscation to a future date.

There is a consignment of three hundred bags of flour to Pearson Goddard, and on the margin of the bill of lading is the word "Barberton" underneath a diamond inclosing the initials "G. G. D. B."

There are consignments of flour to the Castle Mail Packets Company, or their assigns, but in the margin are the words, "Notify A. May & Co., Johannesburg."

Moreover, across the face of the bills of lading relating to these consignments appears the following agreement in writing:

"As any cargo which may be deemed to be destined for the Transvaal and (or) Orange Free State is liable to be detained, intercepted, confiscated, and (or) otherwise restrained in the ports of Cape Colony or Natal, it is agreed by the shipper, in accepting this bill of lading, that the steamer, her owners, charterers, and (or) agents are released from all responsibility in respect of goods so detained, intercepted, confiscated, and (or) otherwise restrained."

A similar agreement appears on a bill of lading for flour consigned to the Castle Company, on the margin of which are the words, "Nantisco, care of Edward Everitt, Pretoria. Notify Mr. Leibman & Co."

There is also a consignment of five hundred and thirteen bags of meal to Bernard Elsasser by a bill of lading, on the margin of which is the word "Barberton," underneath a square inclosing the initials "B. E."

A claim has been made by Julius Leibman to the cargo consigned to M. Leibman & Co., on the ground that he had left the Transvaal towards the end of October, 1899. He says that he left with a view partly of escaping police duty, and partly for the purpose of stopping a shipment of flour which was arriving for the firm by the *Marie*, and that he was not aware of a shipment being on board the *Mashona* until informed of the fact after the commencement of the present proceeding. He does not state, however, that his firm is no longer carrying on business in the Transvaal, or that his partner, Moritz Leibman, has left that country. The goods were seized while on the way to Pretoria via Delagoa Bay, and no attempt was made to divert them from their course before the capture.

The same remark applies to the goods consigned to Bernard Elsasser, which are claimed on his behalf by his agent, Charles Day. Elsasser himself has made no affidavit, and is described by Day as a merchant of Barberton. It does not appear that he left the Transvaal after the outbreak of hostilities, or that he has ceased to carry on business in that country. His agent, Day, however, states

that he (Day) did all in his power, when the war became imminent, to stop shipments under order for his principal, but that his cabled and written instructions were too late. He further states that his instructions on leaving the Transvaal were to stop and dispose of all goods arriving at the coast; that certain goods consigned by other vessels had been so stopped and disposed of at Port Elizabeth, and that before the seizure his intention was to adopt the same course with regard to the goods shipped in the *Mashona*. The fact, however, remains that when the goods were seized they were the property of, and on the way to, a merchant carrying on his business in the enemy's country. Clearly, therefore, the goods consigned to M. Liebman & Co. and to Elsasser are liable to confiscation.

No claim has been made to the goods consigned to A. Johnston & Co., Pretoria: as, on the face of the bills of lading, the goods were consigned to that firm, they were liable to confiscation. There is an unimportant item of one case of catalogues consigned to the United Engineering Works, Johannesburg, which must also be confiscated. As to the consignments to Pearson Goddard and to the Castle Company for A. May & Co., it would appear that the consignees left the Transvaal within a reasonable time after the outbreak of hostilities, and the *Attorney-General* has accordingly withdrawn the claim for the confiscation of these and several other consignments in a similar position. The only goods, therefore, which the Court will, for the present, condemn as lawful prize are those consigned to A. Johnston & Co., M. Leibman & Co., B. Elsasser, and the United Engineering Works. The remainder of the cargo not claimed—*vis.* the items numbered—will not be condemned until a year and a day shall have lapsed from the return of the *Monitor*, with the exception of the lubricating oil for the Netherlands Railway Company, as to which the Court will give final judgment at a future date unless in the meanwhile a definite arrangement is arrived at between the Governments of Great Britain and the Netherlands. It has been strongly urged upon the Court that the goods are not liable to condemnation on the ground that they were consigned to a neutral port.

In the case of the *Jonge Pieter*, however, it was held by Lord Stowell that the interposition of a prior port makes no difference. "All trade," said the learned judge, "with the enemy is illegal; and the circumstance that the goods are first to go to a neutral port will not make it lawful." Moreover, it should be remembered that the goods are claimed as lawful prize on the simple ground that they were taken afloat and belonged to the enemy. As remarked by Halleck (2 International Law 129), "Goods *in transitu* from a neutral country to a belligerent, if they are to be delivered to and become the property of a belligerent immediately on their arrival, are considered as his goods during the voyage, and subject to capture and confiscation." The question still remains whether the ship should also be condemned as lawful prize. An opportunity was given to the owners and charterers after the first hearing to give further proof that they had no intention of trading with the enemy except with the permission of the Crown. On November 20 Mr. Clunie, the travelling agent of the Bucknall Line, wrote to the Military Director of Railways in Cape Town, informing him that in future and so long as the war might last a copy of manifests of cargo for Delagoa Bay laden on board the Bucknall steamers would be sent for his inspection, as the Company were desirous of affording any information that might be in the interest of the Imperial Government. Mr. Herbert, the local agent at Cape Town of the owners, in his affidavit says:

"After the arrival of the steamship *Johannesburg* on October 24, 1899, I was verbally informed by the Collector of Customs (in Cape Town) that in order to obtain the necessary clearance for the vessel it was imperative that a bond of

£10,000, that the owners would land the cargo for Delagoa Bay at either Port Elizabeth, East London, or Natal, as directed by the Customs, should be entered into in favour of the Customs . . . and I was further informed that this course would have to be followed with all following steamers carrying cargo for Delagoa Bay or any cargo that might be consigned either to Port Elizabeth, East London, or Durban destined for the Transvaal or Orange Free State. Upon enquiry I was likewise informed by the Collector of Customs that he was acting upon instructions received from his Excellency the High Commissioner, through whom these orders had been communicated by the Secretary of State."

It is clear from his affidavit that had the *Mashona* made Cape Town her first port of call the same course would have been adopted as with the *Johannesburg* and other ships belonging to the company. It appears, further, from the affidavit of Ernest Martin, the agent for the charterers at Port Elizabeth, that the Sub-Collector of Customs there had received instructions from the Collector of Customs in Cape Town to pursue a similar course at Port Elizabeth. I am satisfied from his affidavit and that of the master that neither he nor the owners nor the charterers of the ship had any intention of trading with the enemy, but that on the contrary it was their desire to assist the British Government in preventing any such illegal trade, and that before the seizure of the ship it was the intention of the charterers to execute a bond undertaking not to land any goods at Delagoa Bay without the permission of the High Commissioner as representing Her Majesty.

There is no denial of the statement made on oath on behalf of the owners and charterers, and the Court may therefore take it as established that in his previous dealings with cargo consigned to Delagoa Bay the Collector of Customs had acted with the sanction of the High Commissioner.

In regard to a portion of the cargo by the *Zulu*, it appears that she was allowed by the High Commissioner to carry it to Delagoa Bay, although on the urgent advice of the agent of the charterers the commander of Her Majesty's ship *Barrosa* was subsequently induced to order the landing of the goods at East London. Can it be held under these circumstances that there was any intention to trade with the enemy? The counsel for the captors strongly relied on the case of *De Hoop*, which was certainly one of great hardship. The cargo in that case had been conveyed in a British ship from Rotterdam bound for a British port during war between Great Britain and Holland. The ship was captured for having been engaged in illegal trading. Condemnation of the cargo was resisted on the ground that the claimants, who had been previously engaged in an extensive trade with Holland, had before the war obtained special Orders in Council permitting them to continue their trade. They were subsequently informed by the Commissioners of Customs of Glasgow, under the opinion of the law advisers of the latter, that no further Orders in Council were necessary, and that all goods brought from the United Provinces could in future be entered without any such permit. The claimants consequently caused the goods in question to be shipped at Rotterdam for their account. Under these circumstances it was urged that the case was entitled to great indulgence, but Lord Stowell rejected the claim for restitution.

"There may," said that eminent judge, "be occasions on which intercourse with the enemy may be highly expedient; but it is not for individuals to determine the expediency of such occasions, on their own notions of commerce merely, and possibly on grounds of private advantage, not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy, and of all the circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. No principle

ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State."

He added that in order to take the case out of the rule there must be legal distinctions, and not mere considerations of indulgence and compassion such as had been put forward in that case.

Such a legal distinction was made by the same judge in the subsequent case of the *Minna*, where he appears to have decided in favour of a ship captured on a voyage from Bordeaux, destined ultimately for Bremen (a hostile port), but with orders to touch at a British port, whence she was to resume her voyage, if permitted (Edwards, p. 55).

In the still later case of the *Mercurius* the same judge ordered the restitution of the ship on the ground that, although the voyage was from an enemy to a neutral port, it was the intention of the party to come to a British port in order to obtain a licence.

"I cannot," said Lord Stowell, "under any view of the case, bring myself to regard the voyage as a fraudulent, continuous voyage: there was no act either done or to be done to found the imputation of fraud; on the contrary, there is sufficient proof of an honest intention to come to this country to procure the licence and to act conformably to it when granted."

In the same manner there appears to me sufficient proof in the present case of an honest intention to pass a bond undertaking not to take the goods to Delagoa Bay except with the permission of the proper authorities. There was no concealment on the part of the charterers or the owners or the master; on the contrary, they all acted with the utmost *bona fides*, and with the sincere desire to give the authorities all the information and assistance in their power.

It is quite true that the Collector of Customs cannot, under ordinary circumstances, be regarded as in any way representing the Crown, but, as I have already remarked, it is not denied that he represented himself as acting under instructions from the High Commissioner. It can hardly be supposed that he would have taken upon himself the responsibility of requiring the previous bonds unless he had definite instructions to that effect. Having given the previous bonds, the agents of the ship honestly believed that a similar bond would be required and given in the case of the *Mashona*.

The presumption of an intention of trading with the enemy arising from the fact that the ship was carrying enemy's goods consigned to Delagoa Bay and destined for the enemy's country, is entirely rebutted by the conduct of all the parties interested in the ship. The claim for restitution of the ship must consequently be allowed.

MR. JUSTICE BUCHANAN:

This being the first occasion on which the Supreme Court has been required to act as a Prize Court, it is satisfactory to find there is no difference of opinion as to the leading principles and rules of law which should govern our decision. But in the view I take of the special circumstances of the case, I think it necessary, even at the risk of repetition, to state the deductions which, in my opinion, should be drawn from the affidavits.

The two issues raised in these proceedings are:

- (1) Whether or not the steamer *Mashona* is liable to confiscation as a prize, on the ground of its being a British ship which was engaged without licence in trading with the enemy; and
- (2) Whether or not a certain portion of the cargo on board the ship is liable to capture, as being the property of the enemy.

As to the first question, it is a clear and well-recognised rule of International Law that a subject of a belligerent is not at liberty to trade with the enemy without licence from his Sovereign. Whether or not there has, in fact and in intention, been such illegal trading is specially in dispute in this suit. The *Mashona* was chartered by the owners—the British and Colonial Steam Navigation Company (Limited)—to the American and African Steamship Line. Messrs. Bucknall Brothers, who are interested in both companies, are the agents for both owners and charterers, and they have been engaged for years in the trade between European, American, and South African ports, and their steamers engaged in this trade are commonly known as the Bucknall Line. The existing charter party was entered into before hostilities had broken out between our Government and the Republics. The *Mashona* had, under a previous charter, been engaged in the same trade. On the occasion of her last voyage the *Mashona* was laden at New York, after hostilities had commenced, with a general cargo for the British colonial ports and Delagoa Bay, the voyage to terminate at the latter place, which is a neutral port. Most of the cargo for Lourenço Marques was, by the bills of lading, consigned to order, or to the ship's agents, but a few of the bills of lading indicated that, though the goods were to be delivered at Lourenço Marques, their ultimate destination was the Transvaal. On most of the bills of lading, including those to order and to the ship's agents, was indorsed a clause setting forth that, as any cargo which might be deemed to be destined for the Republics was liable to be detained, intercepted, confiscated, or otherwise restrained in the ports of the Cape Colony or Natal, the ship was released from liability in respect of any such cargo detained or intercepted. The *Mashona* was bound first for the British colonial ports, and would have to enter and clear at these ports before proceeding to Delagoa Bay. Immediately on arriving at Algoa Bay, in this colony, the *Mashona* was seized and attached, as well as was such portion of her cargo as had been shipped for Lourenço Marques. Before, however, the *Mashona* put into port, other steamers of the Bucknall Line had arrived at Table Bay, carrying, among other consignments, cargo for Delagoa Bay ultimately destined for the Transvaal.

By our Customs Regulations the manifests of all vessels entering our ports have to be submitted to the authorities, by which means the destination of all the cargo becomes patent to the officials of the Department. After hostilities had commenced, the Customs authorities, at the instance of the High Commissioner, upon instructions of Her Majesty's Secretary of State, required that all vessels arriving with cargo for other ports, before being allowed their clearance, should either land so much of their cargo as was forbidden to be taken to its destination, or, if that was inconvenient, owing to the manner of the ship's stowage, to enter into security bonds undertaking to deliver into the custody of the British Colonial Customs authorities all goods consigned to either of the Republics which were liable to confiscation owing to the said countries being at war with Her Majesty's Government. The agent for the Bucknall Line states, moreover (and this is not denied), that he was informed by the Collector of Customs that the same course would be adopted with all following steamers carrying cargo for Delagoa Bay destined for the Transvaal or Orange Free State.

Owing to its geographical position, Table Bay was the first Cape port usually made by steamers from Europe or America; and the procedure just described was adopted there, not only with the steamers of the Bucknall Line which had arrived before the *Mashona*, but also with vessels belonging to other lines, and the same practice has been continued with all vessels putting into Table Bay subsequently to the date of the arrival of the *Mashona*, none of which vessels

have been seized. It seems most probable from the affidavits that the same course would have been adopted with the *Mashona* itself had its first port of call been Table Bay instead of another Cape port—*viz.* Algoa Bay—and, as far as the owners were concerned, it would also have been followed in the case of the *Mashona* at Port Elizabeth had the naval authorities not interfered. It is beyond doubt in this case that the shipowners and charterers have acted with perfect good faith, and that neither they, nor any of their agents, nor the captain of the vessel, intended to do anything illegal.

On the contrary, they unreservedly desired to submit to the control of the Government authorities here.

It is contended, however, that no matter what *bona fides* existed, through or by the fact of having done an act of trading without licence the ship must in law be declared forfeit. That there is a strict rule of law on the point is indisputable, but, looking at the circumstances of the case, I fail to see that it forces us to a conclusion fatal to the vessel. That there was no intention on the part of the owners to trade illegally is shown by the affidavits of the captain, of the owners, and of their various agents in this colony. The captain says that the idea of trading with the Queen's enemies never entered his mind, and that such a course would not only be repulsive to his British instincts, but contrary to the standing instructions of his owners against acting illegally in any way whatever.

Mr. Clunie, the special travelling agent of Messrs. Bucknall Brothers, was sent out to South Africa shortly after the outbreak of hostilities generally to protect the interests of the company. He was particularly and specially instructed by his principals to give the Imperial Government all the assistance in his power, and he acted to the best of his ability upon these instructions.

The *Zulu*, belonging to the same owners, which had arrived here before the *Mashona*, had cargo on board for Delagoa Bay, as to which the Imperial authorities entertained doubts whether it was for the Transvaal Government or for a private company. The authorities at first authorised this cargo to be sent forward, and it was only on the voluntary efforts and repeated representations of Mr. Clunie that it was ultimately stopped and landed in this colony. Before the arrival of the *Mashona*, Mr. Clunie wrote to the military authorities as follows:

"I have the honour to inform you that in future and during such time as the war lasts a copy of manifests of cargo for Delagoa Bay laden on board the Bucknall steamers arriving at this port will be sent to you for your inspection, as we are desirous of affording any information that may be in the interest of the Imperial Government."

On the arrival of the *Mashona* there was no attempt at any concealment, and the fullest inspection of documents was given before the seizure. True, the agent's letter only mentioned Table Bay, but I do not think that the fact of the first arrival being at Algoa Bay should make any difference, there being the full intention to comply with all the restrictions which had been imposed.

From the affidavit of the local agent it appears that a bond similar to that required here was taken in the case of a previous steamer which had first arrived at Algoa Bay, the sub-collector stating that he acted on instructions from Cape Town. There is no question raised in this case of contraband of war, either actual or constructive. The cargo was of a nature which could lawfully be laden at New York. Trading to Delagoa Bay, another neutral port, was not of itself illegal. Though a quantity of the *Mashona's* cargo for that port was initially attached, at the first hearing the captors abandoned their claim for confiscation as to a large proportion of it. Some of this cargo was for the Portuguese Government, some for

residents at Lourenço Marques; and some, though, according to the manifest, destined for the Transvaal, was claimed by and abandoned to subjects who had withdrawn from the Transvaal on the outbreak of the war, and who desired that their goods should be delivered to them in Natal. The accusation of illegal trading is based on the rule of law as to continuous voyages, by which the ultimate destination of the goods, and not the port of call of the vessel, is looked at.

It must be taken in this case that it was known when some of the goods were taken on board at New York that their final destination was not Lourenço Marques, but the Transvaal. Against this a point might be made in favour of the vessel from the fact that the goods were not to be carried by the shipowners beyond the neutral port, and that in any forwarding from there they were not in any way concerned. The real defence, however, is based on the contention that the goods would not in any event have been taken by the vessel even to the neutral point without the permission of the authorities first being obtained, and this intention was communicated to the shippers before the voyage was begun. The case of the *Mercurius* (Edwards, 53) is an authority for holding that it is not necessary to obtain a licence before the commencement of the voyage. There the voyage was from an enemy's port to a neutral port, but with instructions to put into a British port to obtain a licence, and the proof of such direction and consequent intention being clear, it was held not to be illegal.

That was a much stronger case for the captors than this, as there the seizure was made after leaving the enemy's port, and before reaching a British port. Here the *Mashona* had not been to any enemy's port, and had already reached a British port. That case was decided by Sir William Scot, the soundness of whose ruling on the Law of Prize has been accepted without question by both English and American Courts, and who, moreover, in other cases would not recognise hardship or *bona fides* as excusing a breach of the law when an illegal act had once been committed.

His Lordship, in discussing the rule as to the ulterior destination of the goods determining the character of the trade, said: "Where everything was to be disclosed and referred to the discretion of the English Government, the case cannot be put on a footing with a continuous voyage framed for the mere purpose of literal evasion." The rules of law in matters of prize are founded on considerations of public policy. The policy on which the rule we are considering is founded is to prevent benefit to the enemy, and to assist the operations of the Government, and for this end to secure to the Government full control of any trading. I gather from the books that owing to the advanced requirements of commerce and a broader recognition of the rights of non-combatants, licences would now be granted with greater facility than was formerly the practice.

The particular mode in which the Government consent is expressed is not material (*The Charlotta*, 1 Dods. 390). Here it is not denied that instructions were given by Her Majesty's Secretary of State through the High Commissioner to the Colonial Customs authorities. It is clear, I think, that these instructions were intended to apply to the manner of trading in which this steamer was employed, and was not intended to operate as a licence to any particular vessel. Their object was to place the conveyance of goods to these ports under supervision and control.

Upon complying with the conditions imposed, all vessels belonging as well to the owners of the *Mashona* as to other companies were without distinction allowed both before and after this capture to carry on their operations. It was the commerce that was intended to be legalised, not an individual licence that was granted. There was every desire and intention to comply with these conditions

in the case of the *Mashona*. When, therefore, the authorities announce that a certain procedure is to be followed by all vessels engaged in a particular trade, and where the owners loyally intend to comply with these requirements and abide by the conditions imposed, to allow any one vessel to be pounced down upon and at the same time to allow others to carry on their trade, would be to permit a course of action repugnant to national good faith (see *Usparicha v. Noble*, 13 East 340).

Under all the circumstances of this case, in my opinion, the restitution of the *Mashona* ought to be decreed. The next issue for consideration is as to the liability of any of the cargo to confiscation.

After deducting the shipments for which no claims have been filed, and against which judgment is not at present asked, and the goods which the captors have abandoned to the owners, there remain only three consignments to which I need make any reference. As to the first of these, the one thousand cases of oil consigned to Lourenço Marques to the Netherlands South African Railway Company, a company which has its head office in Holland, no formal claim has been filed, but the Consul-General for the Netherlands has interposed, and asked for time to obtain information and instructions. The Court considers this request reasonable, and as further time is to be given, any expression of opinion hereon had better be postponed. The other two consignments to which I refer are those claimed by Leibman & Co. and Bernard Elsasser. Both these parties are neutrals, and both carried on business in the Transvaal before the commencement of hostilities.

In the case of Elsasser the orders for the goods were given months before, and immediately the relations of the respective Governments became strained and war became imminent he did all in his power to stop the goods. Certain goods which had been ordered arrived after the war commenced by the steamer *Beatrice*, and were delivered to the claimant at the port of East London, and sold there. Those that were forwarded by the *Mashona* had been actually alongside the *Beatrice*, but had been shut out. I gather from the affidavits that the claimant did not intend any of these goods now to reach the Transvaal, and had they come forward by the *Beatrice* these very goods would have been delivered to him and sold with the rest in this Colony.

Moreover, other consignments for the Transvaal, which had arrived for the claimant since the seizure of the *Mashona*, had been delivered to and sold by him here. As regards the claim of Messrs. Leibman & Co., one of the partners had left the Transvaal shortly after the commencement of hostilities with the object of stopping their goods from entering the Transvaal. Part of their shipment had also arrived by the *Beatrice*, and had been delivered to them and sold by them at East London. The cargo by the *Mashona* was also intended to be stopped and sold here. Other cargo received by the *Marie* was also delivered at colonial ports. Both these claimants have not closed their businesses in the Transvaal, but not being British subjects, there was no obligation upon them to do so. They are not themselves enemies, but the destination of their goods to the enemy's country impressed them with a hostile character. That destination has now been changed. There has been no concealment in respect of these goods, or other conduct, to raise a suspicion of bad faith.

It is, I think, a fair deduction from the facts that if these very goods had been on any other vessel but the *Mashona* they would have been delivered over to the claimants in this Colony or in Natal. The policy of the law, which is to prevent goods reaching the enemy or to benefit the enemy's country, would not be contravened by giving up these consignments in this Colony, and on the maxim *Cessante ratione legis cessat ipsa lex*, I should have been prepared to decree

restitution of these goods also. But my colleagues do not consider the claimants have done all they ought to have done to remove the hostile character which *prima facie* attached to their goods. The view they take of the facts, as I understand it, is briefly this, that as far as the documents show, but for the action of the authorities the claimants would have allowed the goods to proceed to their destination. This is a question of fact, and if that is found against the claimants, the goods are liable to confiscation. At all events, as far as the ship is concerned, we are agreed that restitution should be decreed.

MR. JUSTICE LAURENCE :

The steamship *Mashona* is the property of the British and Colonial Steam Navigation Company, and chartered by the American and African Company, both British companies, having their head offices at the same address in London, managed by the same agents, and apparently in close business relationship with each other. On November 3, 1899, or about three weeks after the beginning of the war between Great Britain and the South African Republic, she sailed from New York with a cargo loaded apparently after hostilities began—one of the witnesses says, "It took between two and three weeks to load her"—for various South African ports, the first port of call being Algoa Bay, in this colony, and the last Delagoa Bay, in a colony of the King of Portugal. A portion of the cargo was consigned to companies, firms, and individuals residing or carrying on business at Pretoria, Johannesburg, and Barberton, in the South African Republic, to whom in the ordinary course it would have been forwarded by rail from Delagoa Bay. The ship was detained in the harbour of Algoa Bay by Her Majesty's ship *Partridge*, and brought to Table Bay, and there placed in the custody of the Marshal of the Prize Court.

The Court is now asked to condemn the ship as good prize on the ground that she was captured while engaged in trading with the enemy, and also to condemn certain portions of the cargo as enemy's property. Without going into unnecessary detail, I propose to make a few general observations as to the principles which must govern the decision of a British Prize Court in a case such as the present.

We have, of course, strictly speaking, to administer the municipal law of England; but that law has to be applied by Prize Courts to the adjudication of the rights and claims of both belligerents and neutrals, and is based on principles which we expect to be observed, and which, in fact, are observed, by the Prize Courts of other civilised nations in similar circumstances, and from this point of view may thus be described as falling within the sphere of public International Law.

The two main points which have to be dealt with in the present case are (1) the right to seize and capture the property of the enemy and his subjects and of residents in a hostile State; (2) the duty of British subjects to abstain from infringing the prohibition against carrying on trade or maintaining commercial relations or intercourse with a hostile State or its subjects. As to the second point, on general principles all intercourse or commerce in time of war between the subjects of hostile States is forbidden.

As Lord Stowell pointed out in the case of the *Hoop*, "This is not a principle peculiar to the Maritime Law of this country; it is laid down by Bynkershoek (in a passage which he cites) as a universal principle of law." He proceeds to show that it was the law not only of England and Holland, but of the other great maritime Powers, France and Spain; "and," he adds, "it may, I think, without rashness be affirmed to have been a general principle of law in most of the countries of Europe."

The same principle has been affirmed with equal precision and emphasis not

only in the Admiralty Court, but in the English Courts of Common Law—*e.g.* in the case of *Potts v. Bell* (8 T.R. 548), and that of *Willison v. Patteson* (7 Taunt. 439). The leading case on the subject I take to be the more recent one of *Esposito v. Bowden* (7 E. and B. 763), where it was laid down by Willes, J., delivering the judgment of the Exchequer Chamber, on an appeal heard before six judges, that "the force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy excepting by the Queen's licence."

"Contracts of affreightment," it was added, "cannot lawfully be fulfilled"; and a passage was quoted with approval from Lord Tenterden's work on shipbuilding, in which he says: "If before the commencement of a voyage war or hostilities should take place between the State to which the ship or cargo belongs, and that to which they are destined, the contract for conveyance is at an end, and the merchant must unlade his goods, and the owners find another employment for their ship."

In this case the authorities were fully considered and reviewed, and the case itself was a strong one, for it was that of a neutral ship, with a neutral master, under charter to a British subject, who was held, by reason of the breaking out of war with Russia, to be relieved from his contract to load a cargo at the hostile port of Odessa.

Having thus made a brief preliminary reference to the general principles regulating the duty of our mercantile marine when we are at war, I proceed to examine the question of the liability to seizure of cargo in cases like the present. At a former period, when the war broke out, all property of an enemy or his subjects, whether found in his territory by an invading force, or elsewhere on land, or on the high seas, was, I take it, regarded as liable, in accordance with the rules and practice of war, to seizure and condemnation.

With regard to private property on land, this harsh practice was gradually mitigated by the progress of humanity, and the desire to render the consequences of war as little oppressive to innocent non-combatants as might be consistent with the effective prosecution of the objects for which war is waged. As a rule, the property of such persons, it is now admitted, cannot be seized on land except when required for military purposes, in which case it can be made the subject of a requisition, or, to use the phrase in vogue in this country, "commandeered," but should be paid for at its fair value; and if this cannot be done on the spot, it should be appraised, and a receipt or acknowledgment of debt given to the owner. The rigour of war, however, has not as yet been similarly mitigated by general international agreement, embodied in or adopted by the Municipal Law of the various Powers, with regard to the private property of subjects of the enemy found on the high seas or in a vessel in a port of the other belligerent. Such property belongs as a rule, not to private individuals, but to traders, and one of the main objects of the belligerent—or, as some put it, one of the mildest methods by which a war can be brought to a successful issue—is to cripple the enemy by destroying his commerce and cutting off his supplies. Certain exceptions, however, have been admitted in the interests of neutrals, and in order to enable them during the existence of a war to carry on their trade with as little inconvenience and molestation as possible.

Accordingly those States, including Great Britain, who were parties to the Declaration of Paris of 1856, agreed among themselves that enemy's goods other than contraband should not be liable to seizure if conveyed in a neutral bottom, and similarly, that neutral goods of an innocent character should enjoy immunity,

even if conveyed in a hostile bottom. But these exceptions to the general rule leave untouched the case of the goods of an enemy or his subjects when conveyed in a ship belonging to either belligerent. In both cases both ship and cargo are liable to condemnation if both belong to the enemy, because their character is hostile, and they are protected by no Convention; if the goods belong to the enemy, and the ship to a subject, the goods, because their character is hostile and unprotected, the bottom because it is engaged in an unlawful venture. With regard to the goods, it may be here observed that the real test is the nationality or domicile of the consignee. If he is a subject of the enemy, or a neutral or a British subject residing or carrying on business in the enemy's country, and to that extent impressed with a hostile nationality, the goods consigned to him in the country are liable to condemnation. It may be that in some cases the property has not actually passed from the consignor, or would not be held to have so passed by the Courts of Common Law. Halleck points out that the rules of these Courts "differ in some respects from those which govern Courts of Prize," and cites various cases to illustrate this proposition. He refers to the general rule that "goods *in transitu* from a neutral country to a belligerent, if they are to be delivered to, and to become the property of, a belligerent immediately on their arrival, are considered as his goods during the voyage, *in itinere*, and subject to capture and confiscation." The exception to this rule, where, by special contract or trade usage, the risk of the voyage is on the consignor, are not "admitted in Courts of Prize, for the very conclusive reason that to permit goods in time of war to be considered the property of the neutral consignor, instead of the enemy consignee, merely on the ground that the former had assumed the risk of transportation, would at once put an end to captures of enemy's property on the high seas. . . . Hence, says Sir William Scot, that part of the contract laying the risk of transportation in time of war upon the neutral consignor is invalid; or rather, as the captor has all the rights which belong to the enemy, his taking possession is considered equivalent to an actual delivery to the enemy's consignee" (Halleck's *International Law*, ed. Baker, vol. ii., pp. 128-130; and of Phillimore, 2nd ed., vol. iii., pp. 740, 741).

It is therefore unnecessary to examine or ascertain the conditions, in such a case as the present, with regard to payment of freight or otherwise, of each particular consignment.

Among the cargo were certain goods (No. 19) the property of the Netherlands Railway Company, which I understand is a Dutch company, but which it is admitted is a railway situated and carrying on business in the Transvaal, and which appears to have a Board of Directors at Pretoria. There is nothing in the papers before the Court to show that any arrangement made between the Foreign Office and the Dutch Government extended to any cargo on board the *Mashona*, or that there was any intention to deliver this oil, not to the consignees, but to the British Consul at Delagoa Bay. It may, however, in the circumstances, be desirable to give the claimants in this case, who have applied for a postponement on the strength of certain diplomatic correspondence, which, as far as I can at present see, does not assist them, an opportunity of adducing further proof, if they can, within a brief delay.

Then there is No. 1 on the manifest, twenty bales of duck, consigned to Johnson & Co. at Pretoria, marked "Transvaal, under rebate," for which there is no claim, and which appears clearly liable to confiscation. "It is not now usual," says Phillimore (vol. iii., pp. 709, 710), "to condemn the goods for want of a claim until a year and a day (a term which was limited by the Prize Act of the Russian war in 1854 to three months) have elapsed from the time of the return of the monition,

except in cases where there is a strong presumption and reasonable proof that the property actually belongs to an enemy." Such presumption and proof appear to be established in this case.

No. 45 seems to be in the same position.

Then there are Nos. 8 and 46, 9 and 10, the property of claimants, neutral subjects, whose businesses, it is not denied, are still being carried on at Pretoria and Barberton respectively. It was for the purpose of these businesses that these goods were shipped to them after hostilities had begun, and there is no proof that they would not have been conveyed thither had they not been intercepted *en route*. I think, therefore, that these claims for release must fail, and that the goods must be taken to be "enemy's property," in accordance with the comprehensive definition of such property applicable to such cases.

I may add that I should have been inclined to take a similar view in the case of Nos. 37 and 43, on the ground that his claimant, Mr. Duncan, does not explicitly state in his affidavit that his business at Barberton has been closed, had not the *Attorney-General*, on behalf of the captors, abandoned these goods. If, then, these goods are liable to condemnation on that ground, *prima facie* the condemnation of the ship as engaged in a prohibited trade would appear to be the necessary sequel. If she was so engaged, the existence of the Charter is clearly immaterial. The action is *in rem*, and the owners are responsible for the acts of their master as their accredited agent (see Phillimore, vol. iii., 746). That the law on this subject is very strictly enforced both in English and other Prize Courts appears from the facts in the leading case of the *Hoop*, and other cases there cited, and those in American decisions, such as that of the *Rapid*. It is also obviously immaterial whether the trading is to or from a hostile port; but in this case there arises the question, of great importance and apparently not covered by any precisely applicable precedent in a British Court, whether the rule also applies to the case of a ship sailing from one neutral port to another, and conveying goods destined to be landed at the latter for consignees residing in the country of an enemy having no port of his own and obtaining his supplies by land carriage from the port of destination. Can it be said that a ship is not trading with an enemy consignee merely because the freight is paid, not by the consignee himself in the enemy's country, but by his agent at a neutral port? The case of a neutral vessel carrying contraband goods, though not identical, is doubtless somewhat analogous. Lord Stowell, who first developed the doctrine of "continuous voyage," refused to apply it in such cases, and held explicitly, in the case of the *Imina*, that goods going to a neutral port could not be regarded as contraband. A similar view appears to have been taken by the Court of Common Pleas in the case of *Hobbes v. Henning* (34 L.J.C.P. 117), referred to by *Mr. Innes*. In the case of the *Commereen*, however, an American Court applied the doctrine of "occasional contraband" to provisions consigned to the neutral port of Bilbao, but destined for the use of the British forces in Spain; and in the more recent American cases of the *Springbok*, the *Bermuda*, the *Stephen Hart*, and the *Peterhof*, the American Courts have applied the theory of "continuous voyage" to cases where it was intended to tranship goods and then convey them to a blockaded port, and also to cases where contraband goods were proved to be intended to be conveyed to the enemy from a neutral port, even when, as in the case of the *Peterhof*, inland transportation was necessary for the purpose.

I need scarcely point out that while trading with an enemy by a ship belonging to the belligerent Power, or running a blockade by a neutral ship, entails its condemnation, no such liability is involved in the carriage of contraband goods

per se by the latter, and that this was the reason why, in the case of the *Peterhof*, the ship itself was held on appeal by the Supreme Court of the United States to be free from liability.

A similar view to that adopted in the United States in the cases above referred to seems to have been taken more recently by the Italian Prize Court, sitting at Rome in 1896, during the war between Italy and Abyssinia, when goods on board the *Doetwyk*, a Dutch ship trading between Rotterdam and the French port of Jibuti, which is the port for Harrar, and situated on the Gulf of Aden, were condemned as contraband. The same principles have been laid down by modern publicists, both English and German, and are embodied in a resolution of the Institut de Droit International, a very authoritative and competent body of experts, at its Congress in 1896, in the following terms :

"La destination pour l'ennemi est présumée lorsque le transport va à l'un de ses ports, ou bien à un port neutre qui, d'après des preuves évidentes et de fait incontestables, n'est qu'une étape pour l'ennemi, comme but final de la même opération commerciale."

It is true that Professor Holland, in his *Manual of Naval Prize Law*, issued by authority of the Admiralty in 1888, does not in terms include a case like the present among those in which "the commander will be justified in considering a British vessel as trading with the enemy." He refers, however, to the case in which "her real port of destination is hostile, though her immediate and apparent port of destination is neutral"; and in a note to this instance he cites Lord Stowell's decision in the case of the *Jonge Pieter*, which turned upon the ultimate destination of the cargo and the absolute prohibition of communication with the enemy "direct or indirect."

There is nothing in Lord Stowell's view as to the conveyance of contraband by neutral vessels, and its limitation to hostile ports, which appears to be inconsistent with holding that a case like the present comes within the prohibition, which he so emphatically affirmed, to the subjects of a belligerent Power of any communication with the enemy whether direct or indirect. The real test, according to the modern view, in both cases, appears to be whether there is clear proof of the ultimate destination, and in the present case such proof is found in the manifest and bills of lading.

If, for example, this ship had been entirely loaded by the charterers at New York with a consignment of goods to be dispatched through agents at Delagoa Bay to the Transvaal Government or to some firm carrying on business at Pretoria, it seems difficult to deny that such a commercial operation would come within the prohibition, which, whatever view may be entertained of its policy, undoubtedly exists; and the fact that other portions of the cargo were the property of consignees at British or neutral ports cannot affect the principle.

It appears to me that, as soon as the war broke out, it became the duty of the master to decline to convey any goods which from the papers in his possession appeared to be the property of enemy consignees. His contract of affreightment could not lawfully be fulfilled, and he should have acted as laid down in the passage from Lord Tenterden's book cited above.

The only point which remains is the question whether it has been established that there was no intention on the part of the master of the ship to trade with the enemy except with permission of the proper authorities.

In the circumstances, such a defence must be established by very clear proof; and although there is no reason whatever to impute any disloyal intention, or *mala fides*, to the owners, charterers, agents or master, I have come reluctantly

to the conclusion that the proof of non-liability on this ground has not been made out.

Had the ship first touched at Cape Town, a course would doubtless have been adopted which, as in other cases, would have secured immunity; and it certainly seems probable, after what had happened in the case of the *Beatrice*, that a similar course would have been followed in this case, had it not been for the intervention of the *Partridge* at Port Elizabeth. The mere fact, however, that the master, in the ordinary routine, would have produced his manifest at the Custom-house, as provided by ss. 19 and 20 of Act 10 of 1872, is not in itself sufficient. There is nothing to show that the attention of the officer would have been specifically called to the ultimate destination of any particular items in the manifest of cargo for Delagoa Bay, or that the matter would have come within his purview. There is no affidavit from the sub-collector there that his instructions were of such a nature that this would necessarily have happened.

The local agent does not allege that he would of his own motion have brought the matter to the collector's notice. In the case of the *Hoop* the claimants proved that they had obtained permission to import from the Commissioners of Customs at Glasgow, fortified by the opinion of the legal advisers of the latter; but the trade was held to be nevertheless unlawful, the permission not to be equivalent to a licence from the Crown, and the claim accordingly failed. In the case of the *Mercurius*, decided by Lord Stowell in 1808 (Edwards, 53), which is certainly the strongest case in favour of the claimants, the Court held it proved that she was, when seized, on her way to a British port for the purpose of applying for a licence to proceed from a hostile to a neutral port.

That she had directions to do so was, as the Court held, "disclosed in the papers and as strongly guaranteed as any fact could be." If in this case the *Mashona* had taken a cargo at New York for Delagoa Bay only, but was proved to have touched at a British port *proprio motu*, and under directions from the charterers, for a similar purpose, the cases would have been parallel. As it is, I fear that the parallel fails in an essential particular. In the present case, as I suggested during the argument, there seems to be an absence of proof that it was not the intention of the master to deliver these goods to the consignees unless prevented from doing so by some competent authority; and this cannot be regarded as equivalent to proof that he intended to apply for and obtain a licence before engaging in intercourse which, in the absence of such licence, was of an unlawful character. From the moment that this ship left New York Harbour I think that she was liable *stricto jure*—a liability which she doubtless shared with many other vessels of the British mercantile marine—to seizure and condemnation; as she was still without a licence when seized, *stricto jure*, the liability remains.

At the same time I must add that I in no way regret that my colleagues have been able to come to the conclusion that the further proof adduced by the charterers is sufficient for the discharge of the ship; since, had she been condemned, it would have been difficult to conceive a stronger case for the indulgence of the Crown.

The *Attorney-General* and *Mr. Innes* argued the question of costs, the former contending that to pay the costs out of the sale of the confiscated goods was virtually condemning the captors to pay their own costs, whereas it had been clearly laid down by the Privy Council in *Schalk v. Otter and Dyke* that captors must be granted their costs where probable cause for the capture was shown.

After argument:

The CHIEF JUSTICE said it did not follow that the ship was in no way to blame in taking this cargo on board. There did not appear to have been any actual

communication between the actual captor and the High Commissioner, but there was reasonable and probable cause for seizing the ship. There was certainly carelessness in taking the cargo on board at New York, and although the intention was perhaps not to have landed it without consent of the proper authorities, still the ship had the goods on board. Under the circumstances he thought the owners and charterers should pay the costs of the captors, save and except those involved in bringing the vessel round to Algoa Bay. There would be no order against the owners of the cargo not confiscated ; the goods not claimed would be sold, and the proceeds lodged with the Marshal for a year and a day from the date of the monition.

Their Lordships concurred.

THE NEW COMMERCIAL CODE OF GERMANY.

[Contributed by G. H. B. KENRICK, ESQ., LL.D.]

Translation of Foreign Codes.—The publication of an English translation of the new Commercial Code for the German Empire gives occasion for a few observations on the present inaccessibility of foreign law to the English lawyer. It is certainly somewhat remarkable that so few of the many foreign legal Codes have been translated into our language. With the exception of the one in question and a translation of the German Penal Code, there exists not a single English translation of the various Codes of Germany, Russia, Austria, Italy, Spain, Portugal, Belgium, the Netherlands, Sweden, Norway, or Switzerland, though most, if not all, of these have been translated into French. Authoritative French translations of the most important foreign Codes are comprised in the *Collection de Codes Étrangers* published in Paris. With regard to the French Codes there is an old English translation of the Code Napoléon, and the Civil Code and Code of Commerce have also been translated; but there is no collective English translation of the modern Codes of France.

It may indeed be said that there is not one of our many public libraries in England (not even the libraries of the Inns of Court, the Universities, or the British Museum) which contains a complete and up-to-date collection of the legal Codes of the great European States.

The ascertainment of the law of a foreign State becomes material in many cases before the English Courts; and although, as is well known, the foreign law in such cases must be proved as a fact by the evidence of experts, it is frequently, before the stage of litigation is reached, of great importance to the legal profession and to other members of the community that foreign law should be reasonably accessible.

In the interests of the science of Comparative Legislation, not to speak of the practical interests of the legal profession and others, these Codes of foreign law should at least find a place in the libraries of the four Inns of Court. It is much to be desired that they should all be also accurately and reliably translated into the English language. Such translation should not indeed be left to individual enterprise, which has so far resulted in nearly all the Codes remaining untranslated; the translation should be officially

undertaken at the public expense, and entrusted to a carefully selected Commission composed of scientific English lawyers as well as of experts skilled in the foreign language and law. As a result, the legal systems of the great European States with which we are politically and commercially in continual competition would be rendered accessible—which at present they are not—to the English-speaking lawyer and to the British and Colonial Courts. The juridical value of such a work would be undoubted, and it is not easy to define the limits of its practical benefits.

The New German Code.—Private enterprise has in the meantime supplied us with a translation of the most recent of the foreign Codes—the Commercial Code for the German Empire, translated from the official text by Mr. Bernard A. Platt. This is a step in the right direction.

The extraordinarily rapid advance made during recent years by the German Empire in the trade of the world, and the keen commercial rivalry thereby engendered, afford a sufficient reason, irrespective of the benefits to comparative law, for placing before Englishmen—alas! always too little instructed in foreign tongues—a translation of the new Commercial Code, embodying the provisions of German Mercantile Law by which German trade and commerce are regulated. As, however, Mr. Platt's work is a simple translation of the Code from the German without any annotation or commentary, and does not contain any reference to or comparison with the corresponding law of England, a few words of comparison and comment may not be out of place in this article.

The new German Commercial Code came into operation (with the exception of a few Articles which have been law since January 1, 1898) contemporaneously with the new Civil Code of Germany on the first day of the present year.

Arrangement of the Code.—The Commercial Code is divided into four books, Book I. treating of Commerce in General, Book II. of Trading Companies and Partnership, Book III. of Commercial Transactions, Book IV. of Maritime Commerce. These four books are subdivided into Sections and Articles, the whole Code comprising 905 Articles. By way of comparison it may be mentioned that the French Code of Commerce adopts as its main divisions Book I., of Commerce in General; Book II., of Maritime Commerce; Book III., of Bankruptcy; and Book IV., of Commercial Jurisdiction. The Russian Code of Commerce (of which there was an official edition in 1893, which was translated into French in 1898) also divides the subject into four books: Book I., Commercial Agreements and Contracts, including Commercial Agency, Company and Partnership Law; Book II., Maritime Commerce; Book III., Commercial Institutions, including Exchanges (*Bourses*) and Markets, Trade Books, Weights and Measures, and Warehouses.

Under the head of Commerce in General, Book I. of the German Code enunciates the law relating to Traders, the Trade Register, Firm Names,

Trade Books, Agency and Authority, Clerks and Apprentices, Agents and Brokers.

Registration of Trading Firms.—There exists under the German law an elaborate system of registration of trading firms and partnerships analogous in many respects to our system of registration of joint stock companies. The importance and advantages of such a compulsory registration of traders and firm names in addition to company registration are obvious. In this respect, however, the English Commercial Law is deficient, for as yet a compulsory trade register is unknown. It may be of interest here to observe that to some extent a remedy for this defect is suggested by contemplated legislation. The Registration of Firms Bill, which was committed to a Select Committee on May 2 last, is intended to provide for the registration of firms and of persons carrying on business under names or styles other than their own. The Bill, if it ever become law, will require any two or more persons carrying on any business in common with a view of profit, and every person carrying on business under any trademark consisting of or containing any name or addition other than the full or usual name of that person, to register with the Registrar of Joint Stock Companies the nature of the business, the full names, residences, and other occupations of the persons carrying on such business, and other particulars. This measure when passed will place this branch of English Mercantile Law on a similar footing to the German law.

Commercial Agency.—The Articles in the Commercial Code on Agency (Articles 84 to 92 and 383 to 406 inclusive) contain a series of isolated rules, in no sense expounding the general law of Principal and Agent, but applying merely to particular mercantile transactions. For the general law of Contract reference must be made to the Civil Code. The possibility of codifying the law of Agency in English law is amply demonstrated by Mr. Bowstead's *Digest of the Law of Agency*, the second edition of which was published in 1898. Its expediency is proved by the utility of the codifying Statutes, the Bills of Exchange Act, 1882, and the Sale of Goods Act, 1893; but as yet there is no English statutory codification of this important branch of law.

Partnership and Company Law.—The Law of Partnership and Company Law form the topics of Book II. of the Commercial Code, s. 1 of which treats of the constitution of a partnership, the mutual rights of partners, the legal position of partners with regard to third parties, the dissolution of a partnership and the retirement of partners, balancing accounts on dissolution of partnership, and prescription in Partnership Law.

The Partnership Act, 1890, which consolidated the English Law of Partnership (with the exception of the rules of procedure in actions by and against partnership firms, and the law regulating the bankruptcy administration of partnership estates), forms a practical and valuable codification of the English law on the subject, and it is noteworthy that the

English consolidating Statute is more scientific and comprehensive in detail than the corresponding Articles of the German Commercial Code. This is at once observable on comparing the imperfect definition of the nature and constitution of a partnership contained in the German Code with the careful definition of the nature of partnership and the exact rules for determining the existence of a partnership which are enunciated in the English Act.

The "Commandite" Company.—The second section of Book II. introduces the subject of a "Commandite Company." This institution, which, though well known to the Continental legal systems, finds no parallel in English law, is defined by Article 161 as a company which has for its object the carrying on of a business under a firm name, the responsibility of one or several of the partners with regard to the creditors of the company being limited to the amount of their subscribed capital (sleeping partners), whilst that of the other partners is unlimited (personally responsible partners).

The English Partnership Bill of 1879, as framed by Sir Frederick Pollock, authorised and regulated the formation of private partnerships with limited liability, corresponding to the *société en commandite* of French and German law; but this scheme for the introduction into English law of a system of limited partnership was rejected by a Select Committee, and forms no part of the Partnership Act, 1890.

Limited Liability.—The law relating to the Limited Liability Company is next treated of in the Code. In such a company all the members participate in the share capital of the company, without being held personally liable for the obligations of the company. After certain general provisions relating to such a company, rules follow regulating the legal relationship of the company and the shareholders, the internal organisation and management, alterations in the Articles of Association, the dissolution and nullity of a company, and penal provisions. In view of the present state of English Company Law the following penal provision of Article 312 is of interest: "Members of the Directorate, or of the Council of Supervision, or Liquidators, if they act contrary to the interests of the company, are liable to imprisonment and a fine not exceeding twenty thousand marks. They can at the same time be deprived of their civil rights. If there are extenuating circumstances, the fine only may be inflicted."

The "Commandite Company divided into Shares" and "Dormant Partnership" form the topics of ss. 4 and 5 of Book II. The nature of a commandite company divided into shares is indicated in Article 320. At least one of the members of a commandite company divided into shares assumes unlimited liability with regard to creditors of the company (the personally responsible member), whilst the rest are interested only to the extent of their subscription to the capital of the company divided into shares (the shareholders).

"Commercial Transactions."—"Commercial Transactions," the subject of

Book III., are comprised under the heads of General Provisions, Purchase and Sale, Agency, Forwarding Agency (a forwarding agent is defined as one who, by profession, undertakes the sending of goods in his own name on account of another, the sender, through the intervention of a carrier or the owner of a ship), Warehousing, the Business of Carriers, and the Conveyance of Goods and Persons by Rail. The subject of purchase and sale is treated of very inadequately in ten Articles, which, however, must be regarded as merely supplemental to the provisions of the German Civil Code. The English Sale of Goods Act, 1893, forms a model codification of this extremely important branch of the law which will compare very favourably with the German codification of the subject.

Maritime Commerce.—The last book of the Code, Book IV., on Maritime Commerce, includes the Law Relating to the Ownership and Chartering of Ships, the Transport of Passengers, Bottomry, Average (General and Particular), Damage Caused by the Collision of Ships, Salvage, the Ship's Creditors, and Marine Insurance. The elaborate provisions of the new German Code on the subject of Marine Insurance, contained in Articles 778 to 900 inclusive, should prove of especial interest to the student of Private International Law, as this was one of the topics under discussion and consideration at the International Law Association Conference at Buffalo, New York, last year. At that conference a scheme for promoting uniformity in the law governing policies of marine insurance—which is likely to be of considerable practical importance—was brought forward by Mr. T. G. Carver, Q.C., of the English Bar; and ten resolutions in the form of rules carrying out principles which were agreed to were adopted by the conference. The limitations of space preclude any comparison here of these resolutions with the Articles of the Code regulating the German Law of Marine Insurance, but the Marine Insurance Resolutions passed at the Conference of the International Law Association will be found set out in Mr. T. G. Carver's article in No. 3 (New Series) of this Journal, at p. 383.

Criticism of the Code.—A new Code of the Commercial Law of Germany has many claims to the consideration of the English legal world, not the least being that it directs attention to the practical possibility of reducing to a coherent whole, and within a convenient compass, the mass of legal rules regulating the trade and mercantile transactions of so advanced a nation as Germany, involved as they are by all the complications of modern civilisation. The absence is, however, noticeable in the German Commercial Code of any systematic exposition within its limits of such subjects as Bankruptcy, Guaranty or Suretyship, Patents and Trademarks, Bills of Exchange and other negotiable instruments, Fire and Life Insurance, and other branches of Mercantile Law which would seem to demand a place in the Commercial Code of any legal system. Bills of Exchange, Trademarks and Patents, and Bankruptcy, it is to be observed, are separately codified in German law. In the French Code of Commerce the Law of

Bankruptcy and of Bills of Exchange is included, and forms a substantive part of the Code. Continuity of treatment of the various branches of Commercial Law appears to be wanting in the German Code ; and one comes to the conclusion that the new German Commercial Code should be viewed rather as a practical supplement to the German Civil Code and the other existing German legislation than as an exhaustive juridical exposition of German Commercial Law. Criticism is easy. But, to use the words of Austin, the vast difficulty of successful codification no rational advocate of codification will deny or doubt ; its impossibility none of its rational opponents will venture to affirm.

CLASSIFICATION OF CRIMES IN MODERN CODES.

THERE have been few more searching studies of the differences in the classification of crimes, their definitions, defences, aggravations, or extenuating circumstances and punishments in the chief countries of Europe than Signor Bosco's contribution to the last number of the *Bulletin de l'Institut International de Statistique*. When completed, Professor Von Liszt's volumes, published at the instance of the *Union Internationale de Droit Pénal*, may tell all that Signor Bosco's tells, and much more; but nothing so exhaustive as this paper is readily accessible. It may suggest hints to those who think our law as to murder irrational. Primarily a statistical study, it touches questions of importance to the jurist. It prepares the way for a reconsideration of definitions and classifications in English Criminal Law which are no longer in harmony with prevalent moral sentiments, and against which juries rebel. One clear impression is left by the paper: in all European countries Criminal Law is in a state of instability or flux; the old boundaries of crime are being revised; conceptions of what is crime itself, what is the efficacy of punishment, are changing; new theories as to responsibility are creeping into Statute Books; the teaching of modern psychology is affecting legislation; a long succession of writers whose aim has been to put law and morality in antagonism have done their work; and there are in progress many experiments indicative of dissatisfaction with the older order and distinctions. The paradoxes defended or problems propounded in plays and novels, the controversies going on among doctors, lawyers, and moralists as to insanity and responsibility, the prevalence of new ideas as to the causes of crime, and the popularising of certain philosophical doctrines, are affecting the Criminal Law of every country. A poet conceives a situation in which ordinary rules break down, and the higher law intervenes. Antigone defies Creon's decrees—she owes allegiance to the dead rather than the living; Hamlet must kill his uncle; the heroes and heroines of Dumas *fils* and Ibsen find themselves in straits in which to follow conventional rules is to do wrong. A rude and imperfect Criminal Law does not deal with these niceties and problems. It allows the jury to cut the knot, or it trusts to the power of pardon, residing somewhere, to alleviate the hardest cases. But—and it is the second impression left by

Signor Bosco's paper—the modern legislator tries to do more than his predecessor; he is not content to draw a few lines, leaving all other distinctions to be determined by the good sense of the jury or the judge. The later Codes enter into complex distinctions, and do not lump together the variety of degrees and forms of guilt loosely comprehended in some such terms as "murder" and "larceny." Classifications based on motives have been attempted. Uncertain and difficult to apply, they are nevertheless a characteristic of some modern Codes. It is significant that the favourite field for novelties and experiments is the law as to homicide. As to all the so-called "natural crimes" there is uncertainty and doubt and controversy, and nowhere are they more prevalent than in regard to homicide.

The paper deals with the following crimes: homicide (*Todtung*), etc.; *lesion personnelle* (*Körperverletzung*), assaults, etc.; rape (*Viol*); *Attentat à la pudeur*; theft (*Vol*); robbery (*Rapine*); extortion. Homicide is treated in much the same manner in all the Codes mentioned; but voluntary homicide is not always sharply distinguished from accidental homicide:

La loi anglaise ne fait pas même cette distinction, et considère le crime d'homicide à un point de vue générale que les autres législations Européennes.

The English law as to homicide goes less than modern codes into details;¹ thus it attaches little importance to the means employed. It is otherwise in modern Codes. In Spanish law, for example, are grouped together homicides committed in an insidious manner, by means of drowning, fire, or poison, or with cruelty, or by augmenting the sufferings of the victim. The Spanish Code also lays stress on the point whether the murder was committed for a price or in consequence of a promise of remuneration. What is the offence of one who, not wishing to take life, does desire to wound, or assault, or steal? The answer of English law to this question is, as every one knows, highly artificial. Homicide committed in endeavouring to commit a felony is murder. The Continental Codes are not consistent as to this. But speaking broadly, in none of them is such an offence treated as homicide, the *animus occidendi* being absent. Such offences are, as a rule, treated as aggravated cases of the offences, accidentally it may be said, causing death. Sometimes they pass unpunished. Many Codes treat them as aggravated forms of *lésion personnelle*. This phrase, borrowed from the Italian Code, is used by Signor Bosco in a comprehensive sense. It is not equivalent to assault; it includes the *Körperverletzung* of the German Code and the *Körpertliche Beschädigung* of the Austrian Code and the *lesione personale* of Italian law. It is injury in a very wide sense.

The general results of Signor Bosco's study are thus summed up: "Lesion" committed voluntarily, and resulting in death, but without the

¹ Note the curious classification of homicide by Plato in the Laws IX. 865.

intention of killing, is not classed as homicide in the German, Austrian, Italian, and Swedish Codes, but is regarded as an example of *lésions corporelles graves*. One of the latest Codes is the Hungarian, which treats these cases in the following manner :

Lorsque la mort est survenue à la suite d'une autre infraction, sans que l'auteur eût le dessein de la causer, elle est regardée comme une circonstance aggravante de cette infraction. . . . Les crimes et les délits à l'égard desquels le Code Hongrois prévoit la mort de la victime comme une circonstance aggravante sont les suivants ; le viol (Art. 237) ; les actes impudiques contre nature (Art. 242) ; l'exposition ou l'abandon d'enfants (Art. 287) ; le duel (Art. 289) ; le empoisonnement de puits, conduites d'eau, et la vente d'objets alimentaires mélangés de substances dangereuses pour la vie ou nuisibles à la santé (Art. 315) ; la violation de la liberté personnelle (Art. 325) ; l'incendie (Art. 424 et 425) ; l'inondation (Art. 431 et 432) ; les dommages aux chemins de fer, navires, etc.

Speaking broadly, English law does not recognise any differences between homicides in the cases of persons closely related and strangers. Such a phrase as "parricide" is a survival of another system of law than our own. In many modern Codes much turns on the relationship of the person killed to the criminal. For example, the murder of an "ascendant" is treated by many Codes as a crime of aggravated atrocity. According to other Codes, the homicides of "descendants," or husbands or wives, are viewed as of exceptional guilt.

Nowhere is the working of what may be called the modern spirit in regard to crime more clearly seen than in the lenient treatment of infanticide. The tendency is to view mercifully the killing of a child in hours of pain and, probably, solitude, misery, and shame.¹ The sense of pity—some prefer to say justice—which juries called upon to apply English law rarely fail to show, has affected European Codes. Some of them (the German, Austrian, Belgian, Hungarian, Dutch and Swedish) deal only with cases in which the mother commits the crime ; others contemplate the husband, the brothers or sisters as the criminal. Some laws (the German, Belgian, Hungarian, Swedish) take account only of the homicide of illegitimate children ; the homicides of other children come under the general law. The offence of infanticide, according to some Codes, is treated leniently only when committed at the moment of birth or shortly after, while the Spanish, Italian, and Dutch Codes find one of the characteristics of the offence in the motive of fear or desire to preserve the honour of some one.

What are extenuating circumstances ? How do they differ from complete defences ? How far is the motive of the criminal to be considered as a mitigating circumstance ? To all these questions the answers are very diverse. The German Code admits as an extenuating fact the circumstance that a blow was struck when the criminal was in a fit of anger brought about by the unprovoked conduct of his assailant. The

¹ See Berner's *Lehrbuch* as to changes in law as to infanticide.

Austrian Code takes into consideration the fact that the crime was committed in a state of excitement natural to human nature. Several Codes treat more leniently homicide committed in the case of husband and wife. The Hungarian Code mentions, among the circumstances which diminish the enormity of the crime, "the state of violent *surexcitation*."

A general view of Signor Bosco's classification of homicides may be thus shown:¹

AUSTRIA.

- I. VOLUNTARY HOMICIDE (*Mord*, s. 135[4]).
- II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.
 1. *Means employed*: Homicide committed by means of poison or any other secret means (*Meuchelmord*, s. 135 [1]).
 2. *Connected with other Offences*: Homicide committed for the purpose of gaining possession of some article belonging to another by means of violence to the person of any one (*Raubmord*, s. 135 [2]).
 3. *Mandate or Agency*: Homicide to the commission of which the criminal has been induced by a reward or by some other means (*Bestellte Mord*, s. 135 [3]).
- III. INFANTICIDE. Voluntary homicide committed by a mother of a child who, at the time of birth, takes away the life of her child, legitimate or illegitimate, or who, by forgetting to obtain for it necessary assistance, suffers it to die (*Kindesmord*, s. 139).

BELGIUM.

- I. HOMICIDE COMMITTED WITH THE INTENTION OF KILLING (*Meurtre*, Art. 393).
- II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.
 1. *Premeditation*: Voluntary homicide committed with premeditation (*Assassinat*, Art. 296).
 2. *Relationship of the Person*: Voluntary killing of parents, natural or legitimate, or of an *ascendant* (*Parricide*, Art. 395 [1]). Homicide, premeditated or otherwise, of a child at the moment of birth or immediately after (Art. 396, ss. 1 and 2).
 3. *Means employed*: Voluntary homicide committed by means of substances which may cause death more or less promptly (*Empoisonnement*, Art. 397).
 4. *Connected with other Offences*: *Meurtre* committed to facilitate theft or extortion or to secure impunity (Art. 475).
- III. INFANTICIDE. Homicide, premeditated or not, by a mother of an illegitimate child at the moment of birth.

FRANCE.

- I. VOLUNTARY HOMICIDE (*Meurtre*, Art. 295).
- II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.
 1. *Premeditation*: Voluntary homicide committed with premeditation, or *guet-apens* (*Assassinat*, Art. 296).

¹ In the case of Germany the classification of injuries (*lesions*, etc.) resulting in death is given.

2. *Relation of Person* : Voluntary homicide of parents, legitimate, natural, or by adoption, or of an *ascendant* (*Parricide*, Art. 299). Blows struck or wounds inflicted with the intention of causing the death of agents of the *force publique* or of citizens entrusted with some public service (Art. 233).
 3. *Means employed* : Attempt on the life of a person by means which may cause death more or less swiftly, whatever be the substance employed or administered, or whatever be the consequences (*Empoisonnement*, Art. 301).
 4. *Connected with other Offences* : *Meurtre*, which precedes, accompanies, or follows on the crime (Art. 304 [1]). *Meurtre*, designed to prepare, facilitate, or carry out a *délit*, whether to aid the flight or secure the impunity of the parties to or accomplices in such *délit* (Art. 304 [2]).
- III. INFANTICIDE. Voluntary homicide of a new-born child (Art. 300).

GERMANY.

- I. VOLUNTARY HOMICIDE WITHOUT PREMEDITATION (*Todtschlag*).
 1. Voluntary *lesion* causing death, but unintentionally (*Tödliche Körperverletzung*, s. 226).
 2. Voluntary *lesion* followed by death, but without intention of causing it.
Means employed : Administration of poison or other substance injurious to health having occasioned death (*Vergiftung*, s. 229).
- II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.
 1. *Premeditated Homicide* : Voluntary homicide with premeditation (*Mord*, s. 211).
 2. *Relation of Person* : Homicide of an *ascendant* (s. 215).
 3. *Connected with another Offence* : Voluntary homicide (*Todtschlag*) committed while carrying out a punishable act, so as to remove some hindrance to the execution of such act or to avoid arrest *en flagrant délit*, s. 214).
- III. INFANTICIDE. Intentional homicide of an illegitimate child committed by the mother during or immediately after its birth (*Kindesmord*, s. 217).

HOLLAND.

- I. VOLUNTARY HOMICIDE (*Doodslag*) committed with the intention of taking away the life of another (Art. 287).
- II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.
 1. *Premeditation* : Voluntary homicide with the intention of taking away the life of another, with premeditation (*Moord*, Art. 289).
 2. *Connected with other Offences* : Voluntary homicide (*Doodslag*) followed, accompanied, or preceded by a punishable act, and committed with the design of facilitating the execution of the same, or, in case of *flagrant délit*, of securing for oneself or accomplices impunity or possession of articles illegally obtained (Art. 288).
- III. INFANTICIDE. Homicide of a child at the moment of birth or a little time after, committed by the mother with the intention of taking away life, under the impulse of fear that the *accouchement* should be discovered (*Kinderdoodslag*, Art. 290).

HUNGARY.

- I. VOLUNTARY HOMICIDE (Art. 279). Voluntary homicide committed in a state of *surexcitation violente* (Art. 281).
- II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.
 1. *Premeditation* : Homicide committed with premeditated design.
 2. *Relationship of the Person* : Voluntary homicide committed in the case of a legitimate relation in the ascending line, or of a mother by her natural child, or of a father who has legitimised such child, or husband or wife, or of several persons (Art. 280). Voluntary homicide committed in a state of violent *surexcitation*, of a relation in the ascending or descending line, or of husband or wife (Art. 281 [2]).
- III. INFANTICIDE. Homicide committed voluntarily by the mother in the case of a child born out of wedlock at the moment of birth or immediately after (Art. 284).

ITALY.

- I. VOLUNTARY HOMICIDE (*Omicidio volontario*, Art. 364).
 1. *Premeditation* : Voluntary homicide with premeditation (Art. 366 [2]).
 2. *Relationship of the Person* : Voluntary homicide of a legitimate *ascendant* or *descendant*, of the father, the mother, or of a natural son, who has been legally recognised. Voluntary homicide of husband or wife, a brother or a sister, an "adoptif" father or mother, adopted son, or *des allés* in the direct line (Art. 365 [1]). Voluntary homicide of a member of Parliament or of a public functionary by reason of his functions (Art. 366 [2]).
 3. *Means employed* : Voluntary homicide by means of poison or committed with no other motive than brutal wickedness or with aggravated cruelty (Art. 366 [3]). Voluntary homicide by means of fire, drowning, etc., or any other *délit* against the public safety (Art. 366 [4]).
 4. *Connected with other Offences* : Voluntary homicide committed with the object of preparing, facilitating, or carrying out another offence (Art. 366 [5]). Voluntary homicide committed immediately after the commission of another offence, with the object of securing profit or advantage, or by reason of not having attained the object in view, or to conceal or suppress the evidence of the offence, or to secure impunity for oneself or others
- II. INFANTICIDE. Voluntary homicide of an infant who has not been *déclaré à l'état civil* during the first five days after its birth to save the honour of the guilty person or his wife, his mother, his *descendants*, his adopted daughter or sister (Art. 369).

SPAIN.

- I. VOLUNTARY HOMICIDE. Homicide without any of the circumstances constituting *parricidio* or *asesinato* (Art. 419). Homicide committed during a quarrel or during a riot or tumult (Art. 420).
- II. VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION.
 1. *Premeditation* : Homicide committed with premeditation (*Asesinato*, Art. 418 [4]).
 2. *Relationship of the Person* : Homicide of *ascendants* or *descendants*, legitimate or illegitimate, and of husband or wife. Homicide of a new-born child committed by any one (424 s. 3).

3. *Means employed*: Homicide committed in an insidious or underhand manner (*Asesinato*, Art. 418 [1]). Homicide committed by means of *inundation*, fire, or poison (*Asesinato*, Art. 418 [3]). Homicide committed with cruelty and serious aggravation of the pain suffered (*Asesinato*, Art. 418 [5]).
 4. *Mandate or Agency*: Homicide committed for reward or promise of remuneration (*Asesinato*, Art. 418 [2]).
- III. **INFANTICIDE**. Homicide of an infant who has not lived three days, committed by the mother to hide her dishonour, or by the maternal *ascendants* with the same intention.

SWEDEN.

- I. **VOLUNTARY HOMICIDE**, committed with the intention of taking life, but without premeditation.
- II. **VOLUNTARY HOMICIDE UNDER CIRCUMSTANCES OF AGGRAVATION**.
 1. *Premeditation*: Homicide committed with the intention of killing and with premeditation, or *assassination* (*Mord*, c. 14, s. 1).
 2. *Relationship of the Person*: Homicide, premeditated or otherwise, of an *ascendant, conjoint*, father- or mother-in-law, parents by adoption, tutor, master, or any one in authority (c. 14, s. 35).
- III. **INFANTICIDE**. Infanticide or voluntary homicide, committed during or after *accouchement* by a woman who is *enceinte* in consequence of illegitimate relations, of a new-born child by acts of violence or failure to do what was necessary to preserve the life of the child (c. 14, s. 22).

Attempts at infanticide by a mother who has deliberately sought to kill her child, but who has been prevented from doing so by circumstances beyond her control (c. 14, s. 23).

Infanticide by a woman who has deliberately sought a solitary place for her *accouchement*, and has caused, without premeditation, the death of the child by want of due care (Art. 24, s. 24).

Space does not permit reference to the details given by Signor Bosco as to other offences; but from his remarks to the effect that several Codes retain traces of archaic ideas as to larceny or theft, the following passage may be cited:

La protection spéciale donnée à la propriété agricole et à l'élevage des animaux, qui constituaient jadis la source principale de la richesse, l'importance attribuée à certains circonstances—telles que le temp de nuit, ou le lieu isolé, ou les chemins publics, à cause du défaut de sûreté qui étaient presque général, donnent lieu, même aujourd'hui, à des aggravations du vol dans les lois de plusieurs pays.

Only a few Codes, such as the German and Italian, take special note as to theft, of the peculiar facts of modern industry, and modern modes of transport.

SOME NOTES ON FOREIGN COMPANIES IN ENGLAND.

[Contributed by ISRAEL DAVIS, ESQ.]

Foreign Companies in England.—The decision of the French Court of Cassation in *La Construction, Limited*, discussed in No. 2 of the Journal for 1899, and by Mr. Thomas Barclay in his work on Companies in France, has given rise to enquiries into the legal situation of foreign companies in this country. The subject is to be reported upon by the writer in the section of Commercial Law of the International Congress on Comparative Law to be held in Paris during the Exhibition. The case of *La Construction, Limited*, raised much doubt as to the position of British companies in France. It may be said, briefly, that in England a similar decision is not to be feared. The status of foreign companies in England was examined in an appendix to Lord Lindley's classical work on Partnership, reprinted with additions in Lindley on Companies, and later cases illustrate the conclusions he arrived at.

Position of Foreign Companies at Common Law.—The English Courts, by Common Law, and without any legislation, recognise the right of foreign companies to carry on business in this country, to sue and to defend proceedings here;¹ and no previous condition, such as that of registration in England, has been imposed. In some of the British colonies it may be necessary that foreign companies should be registered in the colonies before they can carry on business with the facilities which they enjoy after registration. An attempt, made in an appeal from Western Australia, to induce the Privy Council to construe a Local Ordinance as having that effect was unsuccessful,² but such legislation would seem to be within the competence of the Colonial Legislatures.³ Such regulations, when made by the colonies, might

¹ *Dutch West India Co. v. Moses*, 1 Strange 611; Lindley on Companies, 5th ed., 909.

² *Bateman v. Service*, 6 App. Cas. 386. The Canadian cases are discussed in the Appendix to Lord Lindley's work. In Natal, English companies have been advised by Colonial lawyers to re-register their memorandum and articles of association in the colony with the registrar of deeds.

³ Compare *Liverpool Insurance Co. v. Massachusetts*, 10 Wallace 566 (Supreme Court, 1870), where an English insurance company pleaded in vain that it was not incorporated, and was held liable to a tax imposed on foreign insurance companies.

of course apply to British companies as well as to those of foreign nations ; but in England itself a foreign company cannot be registered under the Companies Acts.¹ Foreign individuals may doubtless register themselves here as a company, but the company thus incorporated by registration would be, at least *primâ facie*, a British one.²

Status of Foreign Companies.—The status of a foreign company is determined by its own statutes ; and if statutes validly framed in accordance with the law of a foreign Power recognised by Great Britain limit the liability of members of an incorporated company, English creditors would be forced to respect such limitation. But while the right to sue (subject of course to the rules as to giving security for costs) and be sued in the corporate name may be regarded as completely ascertained, difficult questions may arise whether particular foreign societies are to be assimilated in English law to private partnerships or to incorporated companies. The determination of this question will be important in deciding whether individual members of the societies may be sued or made liable in execution. It was touched upon in argument in *General Steam Navigation Company v. Guillon*, 11 M. & W. 877 (1843), and again in the American case of *Liverpool Insurance Company v. Massachusetts*, 10 Wallace 566, already cited. It will be remembered that, while in the view of the English law a private partnership is not a moral person, but only an aggregation of individuals, subject indeed to specific rules in bankruptcy, a more common conception among Continental jurists is that a partnership exists as a separate entity. It was argued in the recent case of *A.-G. v. Jewish Colonisation Association*, 16 T.L.R. 385 (May 16, 1900), in accordance with dicta in *Cesena Sulphur Co.*, 1 Ex. D. 428, that a company registered in England as an English company might become a foreign company by holding its meetings and conducting its operations in France ; and if this argument had succeeded, the converse would naturally apply, that a foreign company might become in effect an English one by similar means. But the contention did not find favour with the Queen's Bench Division. A like thesis is supported in a note to Story's *Conflict of Laws* (8th ed., by Melville Bigelow, p. 177, on s. 106). Mr. Dicey briefly states that registration is not decisive of domicile.³ It may be safely said that circumstances of sufficient weight to rebut the inference as to domicile which naturally arises from registration will rarely (if ever) occur in practice. To escape certain provisions of the Joint Stock Companies Acts, companies have sometimes been registered in the Isle of Man, or in the Channel Islands, to carry on business in the United Kingdom. The freedom with which companies thus incorporated trade is an example of the liberty accorded in England to foreign companies. Similarly, companies formed for the purpose of trading in England have been registered in Scotland in order to evade the Companies

¹ Buckley on Companies, pp. 4 and 9 ; *Bulkeley v. Schuts*, 3 P.C. 764.

² Companies Act, 1862, s. 6. Cf. *Cesena Sulphur Co.* 1 Ex. D. 428.

³ Dicey on *Conflict of Laws*, 156.

Act of 1890, which applies only to England and Wales. Of course no such intention animated the founders of the great majority of the companies which trade in the several parts of the United Kingdom, though established elsewhere.

Rights under Treaties.—The rights referred to above have been recognised by treaties with several countries. The treaty with France may be quoted as an example of these conventions. It is dated April 30, 1862, and runs as follows (omitting formal parts):

ART. I.—The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the tribunals, whether for the purpose of bringing an action or for defending the same, throughout the dominions and possessions of the other Power, subject to the sole condition of conforming to the laws of such dominions and possessions.

ART. II.—It is agreed that the stipulations of the preceding article shall apply as well to companies and associations constituted and authorised previously to the signature of the present Convention, as to those which may subsequently be so constituted and authorised.

ART. III.—The present Convention is concluded without limit as to duration. Either of the high Powers shall, however, be at liberty to terminate it by giving to the other a year's previous notice. The two high Powers, moreover, reserve to themselves the power to introduce into the Convention, by common consent, any modifications which experience may show to be desirable.¹

Treaties in almost precisely the same words have been made with Belgium (November 13, 1862), Italy (November 26, 1867), Spain (January 29, 1883), Greece (August 4, 1888); there is also a declaration with Germany made on March 27, 1874, which contains the following additional paragraph:

It is agreed that such companies and associations established in either of the two countries shall only be admitted to the exercise of their business or trade in the dominions of the other party if found to be in compliance with the conditions prescribed by the law of that country.

A clause to somewhat similar effect (Clause 16) was inserted in the general commercial treaty with Tunis of 1875.

Procedure.—When foreign companies trading in England are sued in England, the writ is served on the manager at the principal office of the company in England (R.S.C. Order 9, r. 8). This rule applies to commercial companies, but not to an educational congregation.² Sometimes foreign companies in their contracts expressly agree that the writ may be served on designated agents in England. Such an agreement is valid, and a writ so served is a legitimate commencement of an action.³ Foreign companies not

¹ Hertslet's *Complete Collection*, vol. xi., p. 218.

² *Haggin v. Comptoir D'Escompte de Paris*, 23 Q.B.D. 519; *La Sainte Union*, 67 L.T. 703.

³ *Montgomery v. Liebenthal* [1898], 1 Q.B. 487; *Annual Practice*, 1900, 55.

trading in England may have notice of legal proceedings in England affecting them in the same way and in the same circumstances as foreign individuals. In motions to amend the Registers of Patents, Designs, and Trademarks the notices to the persons and companies abroad are given by letter.¹ In actions, notice of writ is served on foreign companies abroad. Notice of writ cannot be served abroad except by leave of the Court, which is only given in the cases specified in the rules of the Supreme Court.²

Income Tax payable by Foreign Companies.—With regard to income tax the London agency of a foreign company which earns profits abroad and profits in England is chargeable with income tax upon the whole of the profits earned in England and so much of the profits earned abroad as is paid to English shareholders. If the English shareholders receive dividends from a foreign country directly, without the intervention of some agent in England who deducts income tax, the shareholders themselves must make a return and pay income tax upon the dividends so received. It was held in the case of the *Great Northern Telegraph Company of Copenhagen* (a Danish company), which had marine cables at Aberdeen and Newcastle, and workrooms, with clerks, at London, Newcastle, and Aberdeen, that the company exercised a trade in the United Kingdom and must pay income tax upon its profits.³

Winding up.—A company incorporated in a foreign country which has its principal place of business in that country, but which has an office, and has assets in England, may be wound up in England; and the pendency of a foreign liquidation does not affect the jurisdiction of the Court to make an order for winding up⁴; but the liquidation in England is often ancillary to a liquidation in the country in which the foreign company is domiciled. The general principle is to ascertain what is the domicile of the company in liquidation; the Court of the country of domicile is then considered as the principal Court to govern the liquidation, and the other Courts (that of England, for example) act as ancillary as far as they can to the principal liquidation.⁵

The jurisdiction is recognised by a provision for reducing the fees applicable to the winding up of companies in cases where the head office of the company being wound up is situated out of England and the liquidation takes place partly in England and partly elsewhere (Lord Chancellor's Order, June 25, 1892).⁶

¹ *La Compagnie Générale d'Eaux Minérales et de Bains de Mer* [1891], 3 Ch. 451.

² R.S.C., Order xi.

³ *Erichsen v. Last*, 8 Q.B.D. 414.

⁴ Buckley on Companies, 466.

⁵ Sir R. V. Williams in *English, Scottish and Australian Chartered Bank* [1893], 3 Ch. 385.

⁶ Palmer's *Company Precedents*, Part II., p. 914.

NON-CHRISTIAN MARRIAGE.

[Contributed by SIR DENNIS FITZPATRICK, K.C.S.I.]

Introductory.—I propose to discuss a question which is, to a great extent, of a speculative nature, and on which there must be much room for difference of opinion—I mean the question of the treatment to be accorded, by the Courts of a civilised country like England, to a non-Christian marriage entered into in a country where a non-Christian system of marriage prevails, and of the extent to which those Courts can give effect to the legal relations, rights, and duties springing directly or indirectly from such a marriage. I should have preferred that the task of discussing this very difficult subject should have fallen to some person really learned in the departments of law to which it appertains. My own claims to speak on it, such as they are, rest chiefly on the circumstance that in the course of my service in India, and since I have returned to England, I have had several times to assist in discussions on it, arising out of the practical exigencies of administrative or legislative work; and my object will have been accomplished if I succeed in marshalling the various subordinate questions involved in it, and bringing together such materials as I can find available for their solution.

The Meaning of Non-Christian Marriage.—To begin with, I must explain what I mean by “non-Christian marriage”; and in order to do this, it is necessary first to say a few words as to “Christian marriage.” English-speaking lawyers use the expression “Christian marriage” to denote a marriage the essential requisites of which are commonly said to be:

- (1) that it must be a union between one man and one woman, to the exclusion of all others;
- (2) that it must be a union for the joint lives of the parties to it; and to these it is presumed we should add a further requisite, though one more commonly understood than expressed, namely,
- (3) that it must be based on the consent of the parties to it.

There is in England, since the case of *Hyde v. Hyde*,¹ what may be called in some sense another criterion for determining whether a marriage is a Christian marriage. In that case Lord Penzance decided that the only marriage with which the present Matrimonial Court can deal is a Christian marriage, and hence if we find that that Court, or a like Court elsewhere in

¹ L.R. 1 P. & D. 130 [1866]; 35 L.J. P & D. 57.

Her Majesty's dominions, has dealt with a marriage of a certain class, or if we can confidently predict that such Court will, if called upon to do so, deal with a marriage of that class, we are in a position to affirm that marriages of that class are Christian marriages.

This expression—"Christian marriage"—has been objected to on various grounds (see, *e.g.*, Laurent's *Droit Civil International*, vol. iv., s. 288), and it must be admitted that it is not altogether an appropriate one. It is, on the one hand, intended to include many marriages which can be called "Christian" only because they conform to a type which we are apt to regard as peculiar to Christianity. Thus it is intended to include marriages contracted before civil functionaries in European countries between persons who are not Christians and without any religious ceremony, certain marriages contracted in India under special enactments passed expressly for persons who are not Christians, marriages like the Japanese marriage which came under consideration in *Brinkley's case*,¹ and almost certainly some Jewish marriages. On the other hand, the expression "Christian marriage" is intended to exclude marriages, say of a polygamous nature, which some Christian community might, without ceasing to be Christian, think fit to sanction among its members in an out-of-the-way part of the world.²

But "Christian marriage" is an expression so well established among us that it is convenient to adopt it; and if we adopt it, it is further convenient to use the expression "non-Christian marriage" to denote all sexual unions which can be considered marriages, but which fall short of the Christian standard in any one of the particulars above specified. But this at once starts the question as to what sexual unions can be considered to be marriages, and to this question it would not be easy to give a definite answer. If, however, an attempt were to be made to define marriage with reference to its legal effects, it might not be very wide of the mark to say that it is such a union between the sexes as is recognised by the law or custom of a people, and adopted by it as the basis of the normal or typical family relations established among that people. This would exclude not only mere casual commerce and irregular unions, but also, as will presently be explained, all but the highest forms of polyandrous unions.

Even when limited in this way, non-Christian marriage presents such a vast number of varieties that it would be out of the question for us to discuss them at large; but we may refer to some of the leading varieties, and in doing so it will be convenient to take up in order each of the requisites of Christian marriage, and consider the marriages that fail to comply with it, it being of course understood that many of these marriages fail to comply with more than one of these requisites.

¹ *Brinkley v. Att.-Genl.*, 15 P. & D. 76 [1890]; 592 L.J. P. D. & A. 51.

² The Mormon marriage dealt with in the *Hyde* case would fall under this head, if it were not that the Mormons are not, as I understand, held to be Christians, and do not consider themselves such (see *Encyclopædia Britannica*: "Mormons").

Conditions of Christian Marriage: (i) "**One Man and One Woman.**"—To begin with, a marriage system may fall short of the Christian standard by failing to comply with the first requisite of Christian marriage—namely, that it must be a union between one man and one woman to the exclusion of all others; and this may happen in one or other of two ways—namely, by its admitting of a marriage between one man and several women, or by its admitting of a marriage between one woman and several men.

— **Polygamous Unions.**—When this happens in the former of these ways, we have what is commonly called the "polygamous marriage." This is the non-Christian marriage which will most engage our attention, and it is to be observed that a man's marriage may be polygamous, though he has, as a matter of fact, only one wife, if it is open to him, during the continuance of his marriage with her, to take another. It is convenient to speak of such a marriage as a "potentially polygamous marriage," using the phrase "actually polygamous marriage" to denote a marriage in which there are actually two or more wives.

Among the Mussulmans of India and many other communities the members of which marry for the proper purposes of marriage, and not mainly in order to employ their wives as labourers, actual polygamy is extremely rare, being, in fact, a luxury of comparatively well-to-do men; but this does not make it much easier to deal with their marriages, for we shall find that, to the Courts in a country like England, the potentially polygamous marriage presents almost as great difficulties as the actually polygamous marriage.

— **Jewish Marriages.**—Under the head we are now considering there fall certain Jewish marriages. The marriages of the Jews of Morocco and certain other remote countries are still polygamous, and must therefore be reckoned as non-Christian; and if it is true, as I have seen stated in some papers which recently came before me, that the Jews of Spain are at liberty to take a second wife with the consent of the first, it would seem pretty clear that their marriages, too, would have to be placed in the same category. But the Jews in other countries of Western Europe appear for many centuries to have given up polygamy. I have lately seen an opinion from a gentleman, a member of the Jewish community in England, and who, I understand, is in a position to speak with authority on the Jewish Law, in which it is stated that one Gershom, a leading man among the Jews of Mayence in the eleventh century, issued a decree forbidding polygamy, that that decree, though resting mainly on his personal authority, has since been followed in practice in civilised countries (*query*, with the exception of Spain above referred to), and that no rabbi or Jewish minister in these countries would solemnise a polygamous marriage. Assuming this to be so, it would seem reasonable to hold that among the Jews of those countries polygamy has been abolished by long usage, and that, so far as this point is concerned, there is nothing to prevent their marriages ranking as Christian marriages.

— **Husband Permitted to keep Concubine.**—There is one other matter to which it is necessary to advert in connection with the polygamous marriage. There may be marriage systems which, though they restrict a man to one wife, allow him to cohabit at the same time with other women, standing on a footing lower than that of a wife.¹ We shall see that in *D'Aguilar v. D'Aguilar* this was alleged to be the case with the present Jewish law of marriage, and we shall also see how Lord Stowell was disposed to deal with the matter. It is enough to say here that it is difficult to suppose that our Courts nowadays would treat a marriage involving this peculiarity as a Christian marriage. It would be difficult to hold that the liberty to cohabit with other women in this way is a mere non-essential incident of the marriage, like, *e.g.*, the right to administer chastisement to the wife, or to place her under restraint of some sort, which a Court dealing with a foreign marriage could refuse to recognise, though it was an incident of such marriage in the foreign country. To hold a man, who had entered into a marriage of the sort here referred to, guilty of a matrimonial offence in keeping a concubine, would be to substantially alter the marriage.

— **Polyandria.**—To speak next of the non-Christian marriage which falls short of the Christian standard by reason of its being a union between one woman and two or more men, it must be remembered that there are many varieties of polyandria, and that the two varieties of it most commonly referred to, differ widely from one another.

The first of these is the lowest form of polyandria—the “indefinite polyandria,” as it is sometimes called—which allows a woman to consort with any men of the tribe she pleases, and to change them from time to time.² This form of polyandria falls altogether outside our attempted definition of marriage, because, where it prevails, the law does not recognise the union of any particular man with the woman, much less make it the basis of family relations; but as it will help us further on to know something about it, a few words regarding it may not be out of place. Polyandria in this form prevails very extensively in Southern India, both within and beyond Her Majesty's dominions. It has given rise to family systems so elaborate and complicated that the Madras Law Reports teem with cases relating to them, but those systems are based exclusively on kinship through women. As a rule—to which there seem to be few, if any, exceptions—the only facts that the law takes cognisance of in determining a question of kinship are the births of certain children from the wombs of certain women. It does not trouble itself to consider how those children came to be conceived. For aught it cares, the mother may have become pregnant as the result of intercourse with a “casual visitor,” as we find him called in the discussions

¹ The Mohammedan Law permits a man to cohabit with any number of his female slaves in addition to his wives, who are limited in number to four.

² I ought to explain that what little knowledge I have of this sort of polyandria is derived merely from books and papers.

on the subject—indeed, if nature admitted of such a thing, they might have become, like the mares in Virgil, “*Sine ullis conjugiiis vento gravidæ*.” The whole thing seems so utterly topsy-turvy from our point of view that, as I found the other day when I had a question of succession in a polyandrous family of high rank before me, it requires a considerable mental effort on our part to think it out. In like manner people living under such a system find some difficulty in realising our idea of marriage. This is strikingly illustrated by recent events in Madras. It had for a long time been becoming more and more the practice, among some of the polyandrous tribes there, for a woman to form a union for life with one man exclusively. She would, on entering into such a union, go and settle in the man’s house, and he would—at least, so far as concerned personal relations—assume the *de facto* position of a husband to her and of a father to her children. Such unions were, from a social point of view, treated with much respect among the tribes in question, and are said to have almost completely superseded polyandria among them; but the customary law of these people did not recognise such unions and regarded the position as still potentially polyandrous. The result was that our Courts found themselves unable to treat these unions as marriages, and the Madras Legislature had to come to the rescue. After considerable discussion it passed an Act called the Malabar Marriage Act, 1896,¹ which in effect provides that such unions shall, on being registered according to a certain procedure, be deemed to be marriages, and then goes on to fix the legal relations that are to arise from them.

— **Fraternal Polyandria.**—The other variety of polyandria to which we have to refer is what Herbert Spencer calls “fraternal polyandria.” The only union of a woman with several men permitted by it is a union between a woman and two or more men who are brothers. It prevails in some parts of the Himalayas, as, for example, among certain classes in the Kulu subdivision of the Kangra district of the Punjab. I cannot find that any case of it has been considered by the Punjab Chief Court, but it is treated by the inferior Courts as marriage, and I venture to think it is rightly so treated, for the union is a permanent one, recognised by the customary law of these people, and made by it the foundation of family relations. The only hesitation there has been is as regards the question of paternity. The impression left on my mind by three or four cases that came before me when I had charge of the subdivision for a very brief period long ago was that, as in some other similar communities, the brothers were regarded as so completely joint in all respects that the wife’s child could, without inconvenience, be treated, and was treated, as the child of them all; but a friend of mine who came after me there many years later, and is familiar

¹ The member of the Legislative Council who took charge of the Bill was himself a member of a polyandrous community, and his speeches in Council show him to have been a man of considerable learning, and of great judgment and tact in dealing with a very difficult problem.

with the system, tells me that that is not so, but that the paternity is always fixed on one of them. Formerly, he says, it was the practice to fix it on the man who was actually the father, or whom, in cases of doubt, the woman declared to be the father; but of late the people, having seen more of the outer world, have begun to be somewhat ashamed of polyandria, and endeavour to make out that the woman is the wife only of the eldest brother, and that the others have nothing whatever to do with her. As a result of this, he tells me, the eldest brother is coming to be regarded as in all cases the father.

(ii) "**For Life.**"—Let us now turn to the second requisite of Christian marriage—namely, that it must be a union for life—and consider what marriages may have to be deemed non-Christian by reason of their not complying with it.

— **Marriage for a Fixed Period.**—There is, in the first place, the union for a fixed period, like that which is permitted to Mussulmans of the Shia sect. The lawyers of that sect—speaking, I fancy, not with reference to anything likely to occur in practice, but merely with the casuist's anxiety to exhaust all possibilities—tell us that such a union may lawfully be agreed on for one day, or even for a part of a day, as, for example, until the setting of the sun. Unions of this class would perhaps in some cases not amount to marriage in the sense in which we are using the word; but when they do, they would certainly not be Christian marriages. Next there is the more difficult case of the marriage which, according to the intention of the parties as embodied in the contract creating it, is one for life, but which is liable to be dissolved in some way during the lives of the parties to it.

— **Dissolubility.**—It need not be said that the circumstance that a marriage is, by the law under which it is contracted, dissoluble by the sentence of a Court,¹ does not prevent its being a Christian marriage. The true view of dissolution by sentence of a Court seems to be that taken in the case of *Warrender v. Warrender*—viz., that it is simply a species of relief, provided to meet an extraordinary state of things not contemplated by the parties at the time of the marriage, but which subsequently supervenes—a species of relief which a Court having jurisdiction to deal with a foreign marriage would give or withhold according to its own law, and without regard to the foreign law under which the marriage was contracted. If this is so, it is clear that the circumstance of a marriage being or not being, by the law under which it is contracted, open to dissolution by judicial sentence is not to be regarded as part and parcel of the marriage contract, or as in any way affecting the substance of that contract.

— **In Pais.**—But can we take a similar view where, by the law under which the marriage is contracted, it is, to use a phrase of Lord Brougham's,

¹ It seems unnecessary for our purpose to speak of divorce by an Act of the Legislature.

"dissoluble *in pais*"—that is to say, dissoluble by the mere act of one or both parties without the sentence of a Court of Justice?

It might, perhaps, be argued that we can do so if the dissolution *in pais* is permitted only on certain definite grounds, the existence of which can be subsequently called in question in a Court of Justice. It might possibly be suggested that the dissolution here is still a mere remedy to meet special cases of hardship or miscarriage not contemplated at the time of the marriage, and that the only difference is that that remedy, instead of being applied by the Courts, can, in the country of the marriage, be applied by the party, subject to the control of the Courts. But it seems almost impossible to take any similar view when divorce *in pais* is, by the law under which the marriage is contracted, allowed at the mere pleasure of a party. The intention of the parties at the time of the marriage to live together till death do them part may be as clear and fixed as you please, and the powers of language may be exhausted in expressing that intention, but what becomes of all this if the law adds on a proviso that one of them may at pleasure rescind the contract? It would be difficult to argue that that does not affect the substance of the contract, and exclude the marriage from the Christian category.

Divorce *in pais* being entirely contrary to modern ideas, a question of this sort could scarcely arise in respect of any marriage contracted in a civilised country, except, perhaps, in the case of a Jewish marriage contracted somewhere abroad; and as regards marriages in uncivilised or semi-civilised countries, it would, I suspect, commonly be found that when the Christian character of a marriage was open to question on the ground of its being dissoluble *in pais*, it would, as is the case with the Mohammedan marriage, be found to be clearly non-Christian on some other ground, and so there would be no need to trouble ourselves about the dissolubility.

— **Malabar and Jewish Marriages.**—But questions of the sort we are now considering have arisen in America, and such a question might present itself if one of the new Malabar marriages referred to above (p. 363) were to come before a Court in England, for, while such marriages conform in other respects to the Christian standard, those who framed the Malabar Marriage Act were compelled by circumstances to make them dissoluble at the mere will of either party by a notice served on the other through a Court exercising no control, but acting simply as an official channel. And then there are the Jewish marriages. It seems clear that, according to the Jewish Law, a Jew may divorce his wife by delivering to her a bill of divorce with certain formalities before some sort of Jewish tribunal.¹ It is to be gathered from an article in the twenty-third volume of the *Law Magazine* (4th Series), p. 317, that that tribunal exercises

¹ See Hammick (*The Marriage Laws of England*), p. 165 and app. vii., where a statement of the Jewish Law by the Rev. Dr. Herman Adler, Chief Rabbi, is given. See also the judgment in *Lindo v. Belisario* (1 Hagg. Consist. 216), where the dissolubility of Jewish

some control over the right of divorce, and it is stated in that article that nowadays a Jew cannot divorce his wife, without her consent, except for "just cause," but what would be deemed to be "just cause" is not explained. It would, however, doubtless be held that a Jewish marriage could not be dissolved in any such way in England;¹ and, as a Jewish marriage celebrated in England would thus be entered into under a law permitting no divorce except by the sentence of a Court, there would seem to be no ground for suggesting that, so far as this point is concerned, such a marriage would be other than a Christian marriage. But there remains the case of a Jewish marriage contracted in a country the laws of which recognise the Jewish divorce *in pais*, and on this it would be difficult to offer any opinion without having full information as to the laws and customs of the modern Jews. It is stated in the article in the *Law Magazine* above referred to that a divorce is never allowed by the Jewish tribunal until a decree has been obtained through the ordinary legal channels. If this means that no bill of divorce is ever allowed at the present day until the marriage has been dissolved by the sentence of the local Civil Court, there is an end of the whole question, for the bill of divorce would thus be reduced to a mere religious ceremony, superadded in order to satisfy the consciences of the parties, and would in no way concern us.

We shall have to revert to this matter of dissolubility *in pais* later on when we come to consider the cases before the Divorce Court, but it may be said at once that it would be difficult to lay down the boundary between Christian and non-Christian marriages at this part of its course with any degree of confidence.²

marriages by bill of divorce is several times referred to. See further *Ganer v. Lady Lanesborough* (1 Peake 25), *Moss v. Smith* (1 Man. and Grang. 228).

¹ It might almost seem, from the way in which Lord Stowell refers to the Jewish divorce in *Lindo v. Belisario* (1 Hagg. Consist. 216), that he would possibly have been prepared to recognise a divorce of that sort effected in England, but such divorces were only incidentally referred to there, and he was in no way called upon to warn people that he would not recognise them. In *Moss v. Smith* (1 Man. and Grang. 228 [1840]), which was an action of *assumpsit* by a Jewish woman who alleged that she had been divorced in England, the question, though raised, was not decided. But in his remarks in the *Warrender* case (2 Cl. & F. at pp. 531-2), Lord Brougham treats the suggestion that an English Court would recognise a divorce *in pais* effected in England as absurd.

² I have not yet looked into the American cases, but it would seem from Bishop's *Marriage and Divorce* (vol. i., ss. 306-8) that they are somewhat conflicting as to the effect which dissolubility at pleasure without judicial sentence should be considered to have upon a marriage when it comes for consideration before the Courts of a civilised State. The peculiar view taken of such matters by the Christian Church will be referred to hereafter; but it may be here mentioned that where a marriage contract between Jews or other non-Christians contained an express stipulation that the husband might divorce the wife at pleasure, that was regarded, according to the "better opinion" of the canonists, as so completely inconsistent with the idea of marriage that the marriage was held void.

(iii) **Consent.**—There remains the third essential of a Christian marriage—*viz.*, that it must be based on the consent of the parties to it, and it will be found to be wanting in large classes of marriages in India, and doubtless elsewhere. I refer to those cases in which the parents or guardians of a boy below the age at which anything that could properly be called consent is possible, and those of a girl in a similar predicament, conclude a marriage—that is to say, a true marriage, as distinguished from a mere betrothal—between them. The want of the consent of the parties is of course supplied if, as usually happens, the marriage is consummated later on; but meantime the marriage is, in the eyes of the law under which it is concluded, a true marriage, and, as it is not based on the consent of the parties to it, it is a non-Christian marriage.

This gave rise some years ago to a discussion with the heads of the various Christian denominations in India, which will be referred to later on when we come to speak of the attitude of the Christian Church toward non-Christian marriage.

A Marriage once Non-Christian always Non-Christian.—As regards non-Christian marriage generally, there is a further point which seems worth mentioning—namely, that the character of a marriage as Christian or non-Christian must be determined by looking at it as it stood at the time it was contracted, according to the law under which it was contracted. In other words, once a non-Christian marriage, always and everywhere a non-Christian marriage. Thus, if the parties to a potentially polygamous marriage were to come into England, the Courts there would not say: “The husband has only one wife, and if we recognise his union with her as a marriage, he cannot, during the continuance of such marriage with her, take a second wife in England. Hence we may treat this union as monogamous and Christian.” They would, on the contrary, hold the marriage to be still polygamous and non-Christian. Similarly, where persons who are not Christians contract a non-Christian marriage, and during the continuance of that marriage are converted to Christianity, the character of their marriage is unaffected by the conversion, and remains non-Christian. This was held by a full Bench of the Madras High Court,¹ and a similar view was taken by the Allahabad High Court.² The Calcutta High Court³ in a case before it acted as if it took an opposite view, but the parties in that case did not appear by counsel, and the point was not raised.

Having thus endeavoured to distinguish as far as possible between Christian and non-Christian marriage, and having described the leading varieties of the latter, it seems necessary in the next place to make one or two observations on the nature of the task before us.

Recognition of Non-Christian Marriages.—It is well known that in extensive portions of Her Majesty’s dominions abroad, and in some places where

¹ I.L.R. 17 Mad. 235 [1893].

² 2 N.W.P.H.C. Rep. 370.

³ I.L.R. 18 Cal. 252 [1891].

she exercises foreign jurisdiction, the systems of marriage prevailing are of some non-Christian type, and that our Courts there have to deal with marriages contracted under these systems according to the law of the parties, except in so far as any portion of that law has been found to be so repugnant to our ideas as to have been amended by some legislative authority. In British India in particular our Courts are, except as just mentioned, bound by the terms of certain Acts of Parliament, or certain local Acts passed under powers delegated by Parliament, to administer the Hindoo Law to Hindoos, and the Mohammedan law to Mohammedans, in matters connected with marriage and legitimacy; and I think it may be said that the English judges who preside in these Courts, and the very learned persons who sit in Downing Street to hear appeals from their decisions, contrive to administer justice in such cases without doing any great violence either to their own feelings or to the feelings of the communities concerned. But with the treatment of the non-Christian marriage by British Courts under such circumstances we are not directly concerned here. What we have to deal with here, as stated above, is the treatment of the non-Christian marriage, and the legal relations, rights, and duties springing directly or indirectly from it, in cases where such marriage has been contracted in some foreign country or in some part of Her Majesty's dominions abroad where such marriages are legal, and comes in some way in question before the Courts in England or in some part of Her Majesty's dominions similarly situated. The question is one of private international law, using the phrase in its widest sense.¹

Its Difficulties.—Now a moment's reflection will show the difficulty of dealing with a non-Christian marriage under such circumstances. As has been over and over again observed by learned persons of all sorts, the Christian marriage is to such an extent the same everywhere that when a Christian marriage contracted (say) in country A comes under consideration in country B, the Courts of country B can, without being subjected to any undue strain, deal with it very much as they would deal with one of their own marriages, and if only certain limitations of jurisdiction have been observed, the Courts of country A can as a rule accept what they do. A set of principles has come into existence to regulate such matters, and these principles are year by year getting better settled and commanding a wider assent.

But if a non-Christian marriage comes before the Court of a country like England, the position is very far from being the same. The various sorts of non-Christian marriage are too different from Christian marriage to admit of their being treated in the way just referred to—at least, when the personal relations of the parties to the marriage are in question. If those relations were to be dealt with, some new set of principles would have to be evolved

¹ As distinguished from the narrower, and, for certain purposes, more proper sense of a body of definite rules already recognised between the Courts of civilised States. It is to private international law in this latter sense Professor Dicey confines himself in his *Conflict of Laws*, and thus non-Christian marriage falls outside the scope of that truly admirable work.

for dealing with them, and about this there would be great difficulties. On the one hand, some of those relations are apt to be of a nature so repugnant to the ideas prevalent in a fully civilised country that it would be beyond the range of practical politics to require the Courts of such a country to accept them *en masse*, or subject only to certain limited modifications, as our Courts in India do. On the other hand, to modify those relations to any considerable extent would be to saddle the parties with a marriage of a sort different from that which they had contracted. It may be said at once that it seems almost hopeless to think of the Courts of a country like England dealing with the personal relations of the parties to a non-Christian marriage, except, perhaps, in regard to some particular points; and one thing above all might be easily anticipated—namely, that a piece of machinery like the English Matrimonial Court, constructed specially for the purpose of dealing with the personal relations of the parties to a Christian marriage, would be found altogether unsuitable for handling non-Christian marriages. It must, however, be remembered that a marriage gives rise directly or indirectly to many other legal consequences besides the personal relations between the parties, and to them different considerations may apply.

Proposed Plan of Treatment.—I now propose, in the first place, to refer to such English cases as have any bearing on our subject. We shall find that they cover only certain portions of the ground, and that as to the question generally we shall have to seek such light as we can get elsewhere. We shall thus be led to refer next to the views taken from time to time of non-Christian marriage by the Christian Church, and, after that, to the general principles of private international law, to such observations on the subject of non-Christian marriage as are to be found in the works of eminent writers on that law, and to some decisions of the Courts of other countries. Finally, it may be possible to suggest some conclusions—at least, in a tentative and provisional way.

Jewish Marriages before Lord Stowell.—The earliest cases calling for notice are those of the Jewish marriages which came before Lord Stowell in the Ecclesiastical Court at the close of the last century.¹ They cannot be expected to afford us anything in the way of authority, properly so called, on the main question before us, and there may be some things in them which would no longer hold good, or which, from the point of view since reached, would be open to criticism; but they form part of the history of our question, and they are interesting and instructive, if only as showing the bent of Lord Stowell's mind in dealing with such matters. The marriages dealt with in these cases were English marriages, and, having regard to what has been said above (pp. 360 and 361), it would seem pretty certain that they were

¹ There were four or five of these cases, but the only two to which we need particularly refer are *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccles. 773 [1794]; and *Lindo v. Belisario*, 1 Hagg. Consist. 216 [1795].

marriages of a sort that would nowadays be classed as Christian marriages; but Lord Stowell, as may be gathered from these cases and from certain well-known passages in his judgments in *Ruding v. Smith* and *The Indian Chief*, seems to have regarded Jews in England almost as if they still retained there something of the quasi-territorial status which was ascribed to them at a very early period of our legal history, or at all events as if they had claims of a very peculiar sort to have their personal law administered to them,¹ and he appears at times to have been inclined to treat their marriages almost as if they were foreign marriages of a nondescript class.

Lord Stowell's Views of the Jurisdiction.—The first point to be noted in connection with the cases now to be considered, is that as to the class of marriages in respect of which the Ecclesiastical Court could exercise jurisdiction. It is impossible to read the judgment of the Judicial Committee of the Privy Council delivered by Dr. Lushington in the case of *Ardaseer Cursitju v. Peroseley*² without receiving the impression that he and his colleagues felt some doubt as to whether Lord Stowell was right in dealing in any way with Jewish marriages in the Ecclesiastical Court; but Lord Stowell himself was not troubled by any doubt of the particular nature that

¹ Sir Erskine Perry, in his judgment in the case of *The Khojas and Memons (Oriental Cases*, p. 127), actually formulated a very far-reaching claim of certain non-Christian people to have their personal law administered to them, and he considered that he had for it the support of Lord Stowell, but in this he perhaps went too far. Lord Stowell never put the dots on the "i's" and the crosses on the "t's," as Sir E. Perry does. The passage (which seems worth quoting), after referring to the well-known remarks of Lord Stowell in *The Indian Chief*, proceeds as follows:—"By the comity of nations, therefore, as existing between princes of Christian and non-Christian faith, the *lex loci* to its whole extent is held not to apply to Europeans placing themselves under the government of the latter. But if this is the case as regards Christian aliens in a foreign State, there can be no doubt that a similar comity requires a similar rule to be observed when a Mussulman or Hindoo seeks a domicile in a Christian country. How far the peculiar laws of such non-Christian aliens would be recognised, it may not be very easy, nor is it necessary, to define beforehand. . . . But on very many questions, such as marriage, divorce, succession, and possibly adoption, there seems no reason to doubt that the proper law to be referred to for the decision of any controversy would not be the law of the Christian community, but the law or usage of the peculiar non-Christian class. That this was the opinion of the great jurist whom I last cited is not left a matter of doubt, for he has stated it expressly in many of his judgments with respect both to Jews and that other singular Oriental race, the gypsies." See 3 Rol. 32; *Ruding v. Smith*, 2 Hagg. Consist. 384; *Lindo v. Belisario*, 1 Hagg. 216.—Since the above was in type my attention has been drawn to the case of *De Wilton v. Montefiore* (L.J., July 21, 1900), and the following passage from the judgment of Stirling J. seems very much in point here. It must be remembered that he was speaking of Jews who were British subjects domiciled in England. "*Lindo v. Belisario*," he said, "was the first case in which the validity of a Jewish marriage was considered by an Ecclesiastical Court. In dealing with it Lord Stowell used language which would not have been inappropriate if the question before him had related to the capacity of the contracting parties as well as to the formalities of the marriage. In fact, however, the question related to the formalities only, and the case was no authority for the proposition that the capacity of members of the Jewish faith to contract marriage was regulated by their own law and not by the law of this country."

² 6 Moo. I.A. 348 [1856].

occurred to them. The first of the cases that came before him was that of *D'Aguilar v. D'Aguilar*. It was a cause of separation instituted by a wife for cruelty and adultery, and he felt no hesitation about entertaining it. He observed that the marriages of Jews were expressly protected by the Marriage Act,¹ and that persons of that persuasion were as much entitled to the justice of the country as any others. "I take," he said, "the doctrine to be that all persons who stand in the relation of husband and wife in any way the law allows, as by a foreign marriage or by a domestic marriage not contrary to law, have a claim to relief on the violation of any matrimonial duty."

The next case was that of *Lindo v. Belisario*, which was a jactitation suit brought by a Jewess against a Jew, charging him with having boasted of a marriage with her which was not good or valid in law.

Lord Stowell said that the case came before him by direction of the Lord Chancellor, otherwise he would have entertained considerable doubt, if not on the jurisdiction itself, at least upon the propriety of exercising it in the particular case. In ordinary cases, he observed, the Court has "the satisfaction of knowing that the principles which regulate English marriages are such as are also generally applicable to marriages of foreign Christian countries, the marriage law of Europe being founded on the same general principles, and having for its basis the ancient Canon Law, so that there is not much danger that the Court can proceed wrongly on such general principles, and on such a basis." But in this case he was called upon to deal with "a question of marriage of a very different kind, between persons governed by a peculiar law of their own, and administered to a certain degree by a jurisdiction established among themselves." He doubted whether the question would not have been better referred to that tribunal. "I cannot," he said, "but be sensible that in applying the general principles of the law of marriage to this case I may be adopting rules that are not duly founded and which may prove highly inexpedient. On the other hand, if I am to apply the peculiar principles of the Jewish Law, which I conceive is the obligation imposed upon me, I may run the hazard of mistaking those principles."

Now what first strikes one on reading this is the great freedom Lord Stowell assumed in dealing with the question of jurisdiction. The idea of laying down for the jurisdiction of the Ecclesiastical Court any such sharply marked boundary line as has since been laid down for the jurisdiction of the Divorce Court does not seem to have suggested itself to him. It does not seem to have occurred to him that, because marriages between Christians were the marriages with which his Court was originally intended to deal, he should, in order to determine the limits of his jurisdiction, ascertain by analysis the essentials of marriage between Christians, and

¹ But the Marriage Acts apparently refer only to the form of celebration. So held in the case of *De Wilton v. Montefiore* referred to in footnote on p. 370.

refuse to deal with any marriage that did not conform to these essentials. He seems to have dealt with the question of jurisdiction, as a physician would say, *pro re natâ*. It is true, as just observed, that the marriages with which he actually dealt were all marriages of a sort which it is pretty safe to say would nowadays be deemed to be Christian marriages, and be dealt with by the Divorce Court. But there is one passage in his judgment in *Lindo v. Belisario* which gives us some ground for suspecting that he did not regard his jurisdiction as necessarily limited to marriages of that sort. In that case he had to decide whether certain ceremonies which had been gone through by the parties were, according to the Jewish Law, sufficient to constitute a marriage, and for this purpose he proceeded to explain what he conceived marriage to be.

After referring to the opinions which have divided the world as to the nature of marriage—some regarding it as a mere civil contract, others as a sacred religious and spiritual contract—and observing that neither view was perfectly accurate, he continues as follows :¹

"It [marriage] is a contract according to the law of nature, antecedent to civil institution, and which may take place, to all intents and purposes, whenever two persons of different sexes engage by mutual contracts to live together. Our first parents lived not in political society, but as individuals without the regulation of any institutions of that kind. It is hardly necessary to enter something of a protest against the opinion, if any such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce, nor would it be so even in the law of nature. A mere casual commerce without the intention of cohabitation and bringing up of children would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children and for such lasting cohabitation, that in a state of nature would be a marriage, and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is popularly called, a marriage in the sight of God. It has been made a question how long the cohabitation must continue by the law of nature—whether to the end of life. Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce ; but must be a contract at least extending to such purposes of a more permanent nature in the intention of the parties. The contract thus formed in the state of nature is adopted as a contract of the greatest importance in civil institutions." Rights of property, he goes on to observe, spring from it, and so on. Now a marriage for any period short of life is, as already observed (p. 364), clearly a non-Christian marriage, and one with which the present Divorce Court would not deal ; and if we are to understand from this passage that Lord Stowell considered it to be an open question whether the Ecclesiastical Court could deal with such a marriage, it is clear that he was very

¹ At p. 230.

far from having formed to himself any such conception of the limits of his jurisdiction as would have confined it to what we nowadays call Christian marriage. It must, however, be remembered that this passage, in so far as it refers to temporary marriages, is a mere *obiter dictum*, inasmuch as the marriage he then had under consideration was not one for a fixed period only.

There is another point to be noted as an illustration of Lord Stowell's free treatment of the question of jurisdiction. He does not seem to have taken the view which the Divorce Court now takes, that the matrimonial jurisdiction in all its branches is one indivisible thing which must be applicable as a whole, or not at all, to marriages of a given description. On the contrary, judging from what he said in the two cases above referred to, he would appear to have considered that one branch of his jurisdiction might well be applicable to marriages of a given class, and another not. He treats the question, to a great extent, as one of convenience, and in particular as one of the effectiveness of the jurisdiction under the particular circumstances.

His Views as to the Substantive Law Applicable.—As to the principles of law which he would apply in a case in which he exercised jurisdiction, we have already seen (p. 371) what he said in *Lindo v. Belisario*, but there is a further point which comes out in the *D'Aguilar* case, and which seems to call for notice. In that case it seems to have been urged, in answer to the charge of adultery brought by the wife against the husband, that he was permitted by the Jewish Law to keep concubines in addition to his wife. Now a marriage involving such an incident as this would seem, as submitted above (p. 362), to be non-Christian, and as such excluded from the jurisdiction of the present Matrimonial Court. But let us see how Lord Stowell deals with the point. He says:¹ "Next as to the adultery. It has been suggested that the Jewish regulations allow concubines. By the Mosaic Law, as at present received, is there any such privilege? If there be any such among the Jews themselves, it would be a great question how it could be attended to in a Christian Court to which they have resorted, and if it could be noticed, it ought to have been specially pleaded, but I think it could not." That is to say, Lord Stowell thought that the Court should refuse to listen to such a plea, or in other words that it should reform the marriage by pruning off from it the objectionable incident in question, and then deal with it as so reformed. This, as already observed (p. 368-9), seems to be a somewhat questionable view. It almost looks like a first step towards the strange view taken (as we shall see further on) by the Canon Law, that when a polygamist has several wives, his marriage with the first wife should be deemed valid, but should be treated as binding on him as a monogamous marriage, and consequently as making his subsequent marriages void *ab initio*. Here again, however, it must be remembered that what we have to deal with is a mere *obiter dictum*.

¹ At p. 785.

What the eventual result would have been if Lord Stowell had had further opportunities of working all these matters out, it is hard to say. It is possible that he might ultimately, under the pressure of circumstances, have arrived at conclusions not very different from those arrived at, *per saltum*, by Lord Penzance in the *Hyde* case, but it seems more probable that he would have gone on to attempt to deal with some sorts of non-Christian marriage, and if he had done so, we might have been ultimately landed in perplexing complications.

I have dwelt on these cases at this length because all that fell from Lord Stowell in them—and, I may add, what was said by that other very learned lawyer, Sir E. Perry, in the passage cited in the footnote on p. 370—whether it would be right or whether it would be wrong in certain respects, and in particular as applied to the matrimonial jurisdiction, displays a breadth and liberality of view, and a sympathy with, and desire to make the best of, institutions widely differing from our own, which it will be desirable to keep in sight when we come to consider the treatment of the non-Christian marriage outside the limits of that jurisdiction.

Diota of Lord Brougham on Non-Christian Marriage in "Warrender v. Warrender."—We have next to refer to a well-known passage in Lord Brougham's judgment in *Warrender v. Warrender*¹ which is sometimes cited in favour of what may be called an extreme view on the question we are considering. In that passage² Lord Brougham, after some observations to the effect that when a foreign marriage is alleged to have been contracted in a foreign country, the law of that country must be referred to for the purpose of ascertaining whether it really amounts to a valid marriage, proceeded as follows:—

"But the rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties—that is, the existence of the contract, and its construction. *If, indeed, there go two things under one and the same name in different countries—if that which is called a marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country where the obligation was contracted.* But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing—a different status from Turkish or other marriages among infidel nations—*because we clearly never should recognise the plurality of wives and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate.* This cannot be put upon any rational ground except our holding the infidel marriage to be something different from the Christian, and our also holding the Christian marriage to be the same everywhere. Therefore all that the Courts of our country have to determine is whether

¹ 2 Cl. and F. 488.

² pp. 531-2.

or not the thing called marriage—that known relation of persons, that relation which those Courts are acquainted with and know how to deal with—has been validly contracted in the other country where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had, the relation has been constituted, and those Courts will deal with the rights of the parties under it according to the principles of the municipal law which they administer.”

Now there has at times been a tendency to give to these remarks, in so far as they bear on non-Christian marriage, an importance greater, it is submitted, than they really deserve. Anything deliberately laid down by so great a man as Lord Brougham on a matter of this kind would be worthy of profound attention, but he was apt to be somewhat discursive at times; ideas presented themselves to his mind with a rapidity which was truly phenomenal, and he was occasionally given to pouring them forth without stopping to put them into shape. We must, therefore, be careful not to lay too much stress on his *obiter dicta*—and whatever Lord Brougham said here about non-Christian marriage was in the most absolute sense *obiter dictum*. He had before him no question about a non-Christian marriage. He was dealing with a Christian marriage celebrated in England between parties domiciled in Scotland, and which had been dissolved by a Scotch Court. What he was arguing was that the Christian marriage was everywhere so much the same thing that when a Court came to deal with a foreign Christian marriage, it could treat it pretty much as it would treat one of its own marriages. He referred to the non-Christian marriage merely for the purpose of contrasting it in this respect with the Christian marriage, and thus bringing out the position of the latter into stronger relief; and referring to it in this way, a man like him—or, indeed, a man of greater precision—would scarcely feel bound to think out in all its bearings the complicated question of the proper treatment of it by our Courts.

As to what really these utterances of his regarding the non-Christian marriage are to be taken to mean there is room for considerable doubt. They have sometimes been referred to in support of the view that no Court in a civilised Christian country can recognise any marriage except a Christian marriage, and that such a Court must treat every other marriage as a mere nullity, under whatever circumstances and for whatever purposes it may present itself for consideration; but it is perfectly clear from the first of the two passages we have italicised above that Lord Brougham did not mean to assert that. It may with more plausibility be suggested that though he did not mean to lay this down in respect to non-Christian marriages generally, he did mean to lay it down in the second passage italicised, in regard to such non-Christian marriages as might be deemed to be polygamous, including those only potentially polygamous. But it is very hard to say what opinion exactly Lord Brougham meant to express in this latter passage, or, indeed, whether he had formed in his own mind any opinion definite

enough to help us. It may be that all he meant to say was that we could not treat a second polygamous marriage as good, standing the first, and that he would have been prepared, like the Christian Church, to treat the first polygamous marriage as good, but as binding the man to monogamy. There is a passage a little lower down which goes to support, to some extent, this view of his meaning; but if that was his view, it is clearly one which we could not accept.¹

Further, whether his observations are to be taken as applying to a first polygamous marriage or only subsequent one standing the first, the question arises—What exactly did he mean by saying that “we never should recognise the plurality of wives,” or, to put it in the more usual form, that we should never recognise a polygamous marriage?

“Recognising” a Polygamous Marriage.—Now what is ordinarily meant when it is said that a particular Court cannot “recognise” a certain marriage, which it is admitted has, as a matter of fact, been contracted, is simply this, that that Court cannot give effect to, or do away with, or otherwise deal with, some or all of the legal relations, rights, and duties springing directly or indirectly from that marriage, by virtue of the law under which it has been contracted; and if Lord Brougham merely meant that he could not in this sense “recognise” a polygamous marriage for the purposes of a case like that before him, and on which his attention would be naturally fixed—a case dealing with the personal relations between the parties to the marriage—that would be no more than was subsequently decided, so far as the English Divorce Court was concerned, in the *Hyde* case. But it must be remembered that one of our Courts might be asked to “recognise” such a marriage for any one of a number of other purposes, as, *e.g.*, if a man of a polygamous race, domiciled and married in his own country, were to die there leaving two wives, and children by both, and these children were to institute proceedings here to recover the share legally due to them of some money left by their father in the hands of an agent here. Now had Lord Brougham thought out all this, and did he mean deliberately to say that for the purpose of the case just put, and of all other cases that could be put, our Courts should refuse to “recognise” a polygamous marriage? I must say that, having regard to the circumstances, this seems extremely unlikely; and it may be added that, if he had thought the whole position out in such detail, he would probably, *more suo*, have given us the benefit of his reflections on it at length. It is a relief to turn from such matters of speculation to the case of *Hyde v. Hyde*, where we shall find ourselves on firmer ground.

Mormon and Christian Marriages—The “Hyde” Case.—The facts of the *Hyde*² case, so far as they are material for our purpose, can be stated in a few words. It was a petition by a husband for a dissolution of marriage on the ground of adultery. The marriage was one celebrated between

¹ Westlake's *Private International Law*, 1st ed., s. 347.

² L.R. 1 P. & D. 130 [1866]; 35 L.J. P. & D. 57.

Mormons in Utah, where polygamy prevailed by law and custom, but the husband had married no wife but the one—in short, the marriage was what we have called a potentially polygamous marriage, and that being so, the Judge (Lord Penzance) held that he had no jurisdiction to grant the relief. In his judgment he referred to the fact that he had “expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered ‘husband and wife’ in the sense in which these words must be interpreted in the Divorce Act.” “Further reflection,” he says, “has confirmed this doubt, and has satisfied me that this Court cannot properly exercise any jurisdiction over such unions.”

“It is obvious,” he says lower down, “that the matrimonial law of this country is adapted to the Christian marriage, and is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties, created.” Having then referred to several of the special remedies provided by the Divorce Act, he truly observes that “if these and the like provisions and remedies were applied to polygamous unions, the Court would be creating conjugal duties, not defining them.”

Further on he says, referring to the above: “This is hardly denied in argument; but it is suggested that the matrimonial law of this country may be properly applied to the first of a series of polygamous unions; that this Court will be justified in treating such first union as a Christian marriage, and all subsequent unions, if any, as void.” But any attempt to do this would, as he shows by certain illustrations he gives, lead to manifest absurdities and inconsistencies, and he accordingly rejects the suggestion. The particular point he decided was that he, sitting in the Matrimonial Court, had no jurisdiction to dissolve a marriage which was even potentially polygamous.

Grounds of the Decision.—But he based his decision on the broad ground that the Matrimonial Court, with its peculiar system of relief and its peculiar principles of action, is a special piece of machinery erected for the purpose of dealing only with Christian marriage, or, as he otherwise terms it, “marriage as understood in Christendom,” and that it was not competent to deal with any other sort of marriage.

Christian Marriage—What?—As to what would be deemed to be Christian marriage for this purpose, he defined it to be “the voluntary union for life of one man and one woman to the exclusion of all others.” That this definition would exclude, besides the polygamous and polyandrous marriage, a marriage allowing a man only one wife, but permitting him to consort with other women standing on a footing lower than that of a wife, and a marriage for a fixed period, seems pretty clear from what has been already said (pp. 362 and 368); but on the question discussed above (pp. 364-5) as to whether,

in any case, a marriage dissoluble by the mere act of one or both the parties to it, without the sentence of a Court, would be a Christian marriage, the judgment gives us no help. It may, however, be noted that in the subsequent case of *Brinkley v. Attorney-General*,¹ in which an application was made under the Legitimacy Declaration Act for a declaration that a Japanese marriage was valid, though it was held necessary for the purposes of such an application to show that the marriage was a Christian marriage, no attempt seems to have been made to ascertain whether—and if so, in what manner—marriages of the sort in question were dissoluble. The application was allowed to pass by the Attorney-General, and was granted by the Court simply on its being proved that the marriage was monogamous. Another observation which suggests itself in regard to this matter of dissolubility by act of parties is that if the Matrimonial Court were to regard a marriage dissoluble in this way as a Christian marriage, and proceed to deal with it as such, there would at least be no danger of this giving rise to anomalies and practical difficulties, such as Lord Penzance shows would arise from its attempting to deal with a polygamous marriage. As already observed (p. 364-5), there could apparently be no dissolution by mere act of parties in England, and if such a dissolution had taken place in the country of the marriage and the Court were prepared to recognise it as putting an end to the marriage,² the result would be just the same as when it recognises a divorce by sentence of a foreign Court. If, again, the marriage was admitted to be still subsisting, it would not seem that the Court's dealing with it would give rise to any particular anomalies or practical difficulties. But all this touches only one of the elements to be taken into consideration in determining whether such a marriage is a Christian marriage.

Jurisdiction of Matrimonial Court over Mutual Personal Rights of Parties—Whether Exclusive.—It does not, of course, follow because there exists in a country a special Court, like the English Divorce Court, established for the purpose of affording certain sorts of relief to the parties to a Christian marriage, and to them only, that somewhat similar relief will not be granted by some other Court in that country to the parties to a non-Christian marriage.

In British India, for example, we have special Matrimonial Courts erected on the model of the English Divorce Court, and it has been held there, following the decision in the *Hyde* case, that they are not open to the parties to a non-Christian marriage; but side by side with them we have the ordinary Courts, which administer to such parties forms of relief which are, to some extent, parallel to those administered by the special Matrimonial

¹ 15 P. & D. 76 [1890].

² In *Ganer v. Lady Lanesborough* (1 Peake 25, about 1891), it was held in an action of debt that the marriage of a Jew was dissolved by a divorce before the Rabbi at Leghorn, but the facts are not fully stated.

Courts; and it is to be gathered from the Natal Law No. 25 of 1891 that the position is in some respects similar in Natal. But no such parallel system of relief exists in England, and Lord Penzance, referring to the possibility of its being suggested that some such system should be established, says: "It may well be doubted whether it would become the tribunals of this country to enforce the duties (even if we knew them) which belong to a system so utterly at variance with the Christian conception of marriage, and so revolting to the ideas we entertain of the social position to be accorded to the weaker sex." This goes to confirm the view expressed above (pp. 368-9) that it would be beyond the range of practical politics to attempt to deal with the personal relations of the parties to a non-Christian marriage in a country like England, except, perhaps, in regard to some special position.

Enforcement of other Rights arising under Non-Christian Marriage.—

But this is very far from exhausting the question before us. It does not necessarily follow, because the judicial system of a country like England must abandon the idea of dealing adequately with the purely personal relations between the parties to a non-Christian marriage, that it should treat such a marriage as for all purposes a mere nullity, incapable of giving rise to any legal consequences whatsoever. It does not necessarily follow that it should refuse to recognise and enforce any proprietary or pecuniary claims to which the marriage may give rise between the parties to it—that it should refuse, for example, to entertain a claim by a Mohammedan wife to a sum due to her on account of her "dower," or a claim by a Mohammedan or Hindoo widow to succeed to the whole or a portion (say) of some funds left by her husband in England. Still less does it follow that, if there were children of the marriage, and they, on the death of their parents, claimed to succeed (say) to funds left by the parents in England, they should be held to be illegitimate, and as such not entitled to succeed. In short, it does not follow, as some have suggested, that our Courts in England should absolutely ignore all family relations among the great majority of the human race, treating all wives among them as mere concubines, all children as bastards, and all property left by an intestate among them as escheating or becoming ownerless.

Lord Penzance was most careful in his judgment in the *Hyde* case to guard against any such startling conclusions being drawn from his decision. At the close of that judgment he expressed himself as follows :—

"In conformity with these views the Court must reject the prayer of this petition; but I may take the occasion of here observing that the decision is confined to that object. The Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third persons, which people living under the sanction of such

unions may have created for themselves. All that is intended to be here decided is that, as between each other, they are not entitled to the remedies, the adjudication, or relief of the matrimonial law of England."

Besides the questions which Lord Penzance here expressly states that he meant to leave untouched, it is obvious from what he says that he means to leave similarly untouched other important questions, which may depend on the validity or invalidity of a non-Christian marriage. You may, for example, have a question of national character or domicile depending on the validity of such a marriage; or, again, the question of the validity of a subsequent marriage may depend on whether a previous marriage of a non-Christian type is to be deemed a valid marriage or not.

Title to Real Property in England.—But though these and all similar questions were left untouched by Lord Penzance, an important case had been decided by the House of Lords some years before, which is absolutely conclusive against the recognition of the validity of a non-Christian marriage for one particular purpose—namely, for the purpose of making out a title to succeed to real property¹ in a country like England. The case referred to is that of *Fenton v. Livingstone*.² It was a Scotch appeal, but it lays down a general principle of private international law which practically must be accepted by the Courts throughout the United Kingdom, and in at least some other parts of Her Majesty's dominions. As the general principle so laid down applies not only to non-Christian marriages, but to certain Christian marriages as well, it would be out of place here to discuss it at length; but it is important for our purpose to understand the exact purport and effect of the decision in *Fenton v. Livingstone*; and certain additional particulars to which we may have to refer later are given in a note further on.

Now as to the question that was decided in that case. It goes without saying that we must look to the law of the *situs* for those rules which would ordinarily be regarded as rules governing the transmission of real estate by operation of law—rules, *e.g.*, determining whether the eldest son, or the youngest, or all the sons, or all the children, are to take such estate in respect to which the father dies intestate; rules determining whether one of the parties to a marriage is, on the marriage taking place or on the death of the other party, to take any interest in the real estate of that other party, and the nature of the interest so to be taken. But suppose that, when we proceed to apply one of those rules to the case of some claim to real property, there emerges a question as to whether a certain marriage, on the validity of which that claim depends, is to be deemed valid, or as to whether the claimant or some person through whom he claims is to be deemed legitimate, are we to decide that question as we should decide it if the claim were one to movables,

¹ The rule in *Fenton v. Livingstone* probably does not apply to chattels real (see Dicey's remarks on the rule in *Birchwhistle v. Vardill* at pp. 505-7 of his *Conflict of Laws*.)

² 3 Macq. 497.

or must we decide it too, as the phrase is, according to the law of the *situs*?¹

The Decision in "Fenton v. Livingstone."—What was settled by *Fenton v. Livingstone* was that we must decide that question, too, according to the law of the *situs*; and this has been explained to mean that though all the persons whose position and acts we might have to consider had been domiciled from first to last abroad, and all the material events—births, marriages, etc.—had occurred abroad, we should decide as if all these persons had been domiciled in the country in which the property is situated, and all these events had occurred there. The anomalous results to which this ruling gives rise have been much dwelt on in the discussions on the Colonial Marriages (Deceased Wife's Sister) Bill now before Parliament; but for the reason already given it would be beyond the scope of this article to discuss them. It is, however, necessary for our purpose to make two observations. In the first place it is important to note that, though it was urged in *Fenton v. Livingstone* that the marriage, on the validity of which the claim there depended, was one of a sort regarded with peculiar abhorrence by the law of the *situs*, and though the judgments in the House of Lords discuss this

¹ A similar question had arisen in *Birthingistle v. Vardill* [1835-1839] (7 Cl. & F. 571 and 895), but had not been decided. In that case a son was born out of wedlock in Scotland of parents domiciled there. Afterwards his parents married there, and he became legitimate by Scotch Law. Then the father died intestate and seised of real estate in England, and the son claimed that estate as heir, contending that, being a legitimate son by the law of the domicile (Scotland), he must be held to be such in the *locus rei sitæ* (England) also. The case was heard twice by the House of Lords on appeal. On the first occasion, in 1835, the opinion of the judges was delivered by Chief Baron Alexander, and was to the effect (1) that the claimant, being legitimate by the law of the domicile, must be held to be legitimate in the *locus rei sitæ* (England) also; but (2) that something in addition to this was needed to make him an heir to real property in England—namely, that he should have been born in matrimony; and that, as this something was wanting in his case, his claim could not be sustained. After some discussion by the Lords, a further argument was directed, and, on the occasion of the further argument in 1839, the opinion of the judges was again taken, with the result that the judges (they happened to be a different set) declined to give any opinion on our point—i.e., the first of the two points above mentioned; but agreeing with the former set of judges on their second point, held on this ground only that the claimant must fail, and the House, accepting their view, gave judgment accordingly. To turn now to *Fenton v. Livingstone* [1859], 3 Macq. 397, which came before the House of Lords twenty years later. The facts of that case, so far as they are material for our purpose, were as follows: The respondent A. L. claimed, as lawful son of T. L., to succeed as heir of entail to estates in Scotland. It appeared that T. L., being domiciled in England, had there married in succession two sisters, Englishwomen, from the second of whom A. L. had been born in England. The marriage of A. L.'s parents, being that of a man with his deceased wife's sister, was illegal in England; but as A. L.'s mother had died in 1832, before Lord Lyndhurst's Act, without that marriage having been judicially declared void, A. L. would have had to be deemed legitimate in England and capable of succeeding to real estate there; and the question was whether, having thus to be deemed legitimate in the country of the domicile, he should also be deemed legitimate in the *locus rei sitæ*—a question exactly similar to that raised, but not decided, in *Birthingistle v. Vardill*. The Court of Session decided in favour of A. L., on the ground that the law of the domicile must determine the question of

point at some length, the decision ultimately arrived at¹ was not based on any consideration of this kind. It was based on a principle which left no opening for such considerations to come in—namely, on the general principle above stated, according to which the Court of the *situs* should, in order to decide whether the marriage was valid or not, look only to its own law, paying no regard whatever to any other law; and that principle rests simply on a peculiar legal theory touching real property, and would apply with just the same force in the case of a marriage of a sort which the law of the *situs* had come to treat as invalid, not on any stringent moral or religious grounds, but merely on grounds of expediency, or even as the result of some of those historical accidents to which a considerable proportion of the law of all countries owes its origin.

The other point to be noted is that while the ruling in *Fenton v. Livingstone* in its application to Christian marriage affects only cases of an exceptional nature, in its application to non-Christian marriage it affects *all* cases; and the result is that, for the purpose of succession to real property situated in the countries in which it is to be followed, it makes the members of all races, whose marriage is non-Christian, bastards, and incapable of taking such property *ab intestato*, and that if, for example, a member of one of these races holds (say) a house in South Kensington in fee simple, and dies intestate regarding it, the result must be an escheat.

Results of Cases so far Examined.—The results to which we have now got are:

- (1) that a non-Christian marriage is not a marriage in respect of which the English Matrimonial Court, or any like Court in Her Majesty's dominions, can exercise its peculiar jurisdiction;

legitimacy. On appeal to the House of Lords three distinct points were urged against A. L.—namely (1), that, the question being one of succession to real estate in Scotland, the Scotch Court ought, according to principles of private international law, to have looked only to its own law, and paid no regard to the law of the domicile; (2) that, even if it were admitted that the law of the domicile—the English Law—should govern the decision, it could not, having regard to the peculiar position established in England previous to Lord Lyndhurst's Act, be held that A. L. was *really* a legitimate son in England; (3) that, even if these two points were decided in A. L.'s favour, the law of the domicile should not, on principles of private international law, be given effect to by the Scotch Courts, because (as it was alleged, though not admitted) the law of Scotland condemned marriage with a deceased wife's sister in a peculiarly strong way, treating it as contrary to the law of God, and making it even punishable with death. All these points were discussed in the judgments delivered in the House of Lords, but their lordships ultimately (p. 560) decided on the first only, holding simply that, the question being one of succession to real estate, the Court of the *situs* should look only to its own law (whatever that law might be) in determining the question of legitimacy, and pay no regard to the law of the domicile. Strange as it may seem after what has been said above regarding *Birithwhistle v. Vardill*, two, or perhaps three, of the noble lords—and one of them Lord Brougham, who ought to have had a lively recollection of *Birithwhistle v. Vardill*—were under the impression that the point they were deciding had been decided, and similarly decided, in that case.

¹ At pp. 560, 561.

- (2) that a non-Christian marriage is not a marriage through the medium of which a claim can be made out, in the United Kingdom and some other parts of Her Majesty's dominion, to succeed to real property *ab intestato*, or, it may probably be added, otherwise by mere operation of law.

As to the rest, the general question of the treatment to be accorded by the Courts of a country like England to a non-Christian marriage entered into in a foreign country in accordance with the law of that country, and of the extent to which those Courts can give effect to the legal relations, rights, and duties springing directly or indirectly from such a marriage, is, so far as we have hitherto carried our enquiry, completely open. We now come to a case decided by one of our most eminent judges (Mr. Justice Stirling) in 1888, which, according to the way in which it is to be understood, may or may not have an important bearing on that general question.

The Baralong Case.—The case referred to is *Re Bethell*,¹ commonly spoken of as the "Baralong case." The facts of that case, so far as they are material for our purpose, were as follows:—

Christopher Bethell, an Englishman domiciled in England, went out to South Africa in 1878, and remained there, retaining his English domicile, until he died. In 1883, when residing in the country of the Baralongs, a barbarous or semi-barbarous tribe living beyond the limits of British dominion, and having a polygamous system of marriage, he desired to find a woman whom he could marry according to the Baralong custom. On his applying to the chief with that object, it was suggested to him by the latter that he might marry the woman in church, but he insisted on marrying her according to the Baralong custom, saying, "I also am a Baralong." It was accordingly arranged that he should marry one Teepoo, a niece of the chief, according to the Baralong form, and he did so in October 1883, and took her to his house. On July 30, 1884, he died, leaving Teepoo surviving, who a few days after was delivered of a daughter.

The way in which the case came before the Court was this: W. F. Bethell, Christopher's father, who had died in 1879, had by his will devised certain real estates in England to trustees upon trust for Christopher during his life, and, in case he should die leaving a child or children, to sell such estate, and to hold the proceeds for such child or children; and if there were no such child, then the testator had made a devise in favour of his eldest son, William Bethell. The income of the property had been remitted to Christopher Bethell from the time of his father's death until his own death, and now the question arose whether the daughter of Teepoo was Christopher's legitimate child, and as such entitled to claim under the will. An attempt was made by the counsel for the child to show that the intention of the parties to the marriage was that it should be a monogamous Christian marriage; but the weight of evidence was the other way, and the Judge

¹ Law Rep. 38 Ch. D. 220: 57 L.J. Chanc. 487.

found that the marriage contracted was a Baralong marriage pure and simple—in other words, a potentially polygamous marriage.

The Decision of the Court.—This being the position, the learned Judge came to the conclusion that the union between Christopher Bethell and Teepoo was not a marriage which he could recognise as valid, and that the daughter must be regarded as illegitimate, and as having, accordingly, no right to take under the will.

Now we shall, no doubt, be all agreed that it was fortunate that the Court was able to arrive at that conclusion. It would be a matter of regret to us all if we were to find that a domiciled Englishman, whenever he happened to be among a polygamous tribe, could, by declaring in an airy way that he considered himself a member of the tribe, qualify himself for contracting a polygamous marriage, with the result that the Courts in England or in British India or other parts of Her Majesty's dominions would be bound to hold that marriage valid, and the offspring of it legitimate. It is only when we come to consider the grounds of the decision, that there is any room for doubt or misgiving.

Views as to the "Ratio Decidendi."—No case has yet come before a Court which would call for a detailed consideration of the judgment, but it has been found necessary to consider it for certain purposes out of court, and the result has been that a difference of opinion has arisen between persons eminently deserving of respect as to what should be understood to be the real grounds on which the learned Judge based his decision. Two views have been taken of those grounds, which may be called the narrower and the broader view. The former view is that the Judge decided as he did only because Christopher Bethell was, at the time of his marriage with Teepoo, an Englishman domiciled in England; and that consequently if Teepoo's husband had been a real Baralong pure and simple, domiciled and married in his own country, and had died leaving (say) money in the hands of an agent in England, as he might conceivably have done, and the daughter of the marriage had come to claim it as his next of kin, it is at least possible that she would have been held to be legitimate. It seems quite clear from paragraphs 605-7 of his *Commentary on the Indian Penal Code* that that eminent lawyer, Mr. J. D. Mayne, would agree with those who take this view.

The broader view is that the Judge decided as he did on the wider ground that every polygamous marriage must be held by a Court in England to be, for all purposes whatsoever, a mere nullity, and that he would accordingly, in the case just put, have held the daughter to be illegitimate.

Now, first, as to the narrower view. If it is right, Mr. Justice Stirling's decision is just what we should all have expected it to be.

The Element of Domicile.—If the English law of marriage adheres to a domiciled Englishman to such an extent and so persistently that he cannot

even contract a valid Christian marriage with his deceased wife's sister in a foreign country, where by the local law such a marriage is permissible, it may well be argued that, *à fortiori*, he cannot, by going into a country where a system of non-Christian marriage prevails, contract a valid non-Christian marriage. It may be added that the language of Lords Campbell and Cranworth in the *Brook* case¹ is sufficiently general to support the view that he cannot. Indeed, we may go further. It seems improbable that, even if Bethell had acquired, in a certain sense of the word, a domicile in the Baralong country, that is to say, if he had settled down there with the most absolutely fixed determination to remain there for the rest of his life and made all his arrangements accordingly—I say it seems highly improbable that such a settlement there would be held to carry with it any such change in his law of marriage as would result from a similar settlement in a civilised country. The laws of a barbarous or semi-barbarous country, especially those relating to marriage, would ordinarily be not territorial but personal and tribal laws, and no mere permanency of settlement would, according to our view, be sufficient to attract them to a civilised outsider. He would be regarded by us as still retaining what Lord Stowell called his “immiscible character” (see Dicey's *Conflict*, ed. 1896, App., note 1, pp. 723-4). It is no doubt possible under some circumstances for an outsider to make himself a member of a community living under personal laws, and thus attract the operation of those personal laws to himself;² but for this something beyond settlement, however permanent, in the country would be required, and we may be certain that, whatever conditions might be necessary for effecting such a change, our Courts would insist on their being fulfilled in the amplest manner and in the best of good faith. There is, perhaps, no community on earth that opens its ranks more readily for the reception of outsiders, and welcomes them more heartily to a participation in its religious and legal institutions, than that of Islam. A Christian professing himself a convert to Islam might, with little more ado, contract one or more Mussulman marriages which would be recognised as valid by the Mohammedan law; but a British Court would be more exacting, and, if it saw reason to believe that he had adopted his new religion in order (to use the words of the late Lord Justice James) that he might be “qualified for the enjoyment of polygamous privileges,” it would probably hold his Mussulman marriages to be bad (see *Skinner v. Orde*, 14 Moo. I.A. at p. 324).

It thus appears, not only that the judgment of Mr. Justice Stirling could be amply supported on what we have called the narrower ground, but, further, that non-Christian marriages entered into by an Englishman form a class apart, and that, whatever conclusions we may come to on the general question before us, we need not feel troubled by any serious apprehensions

¹ 2 House of Lords 193 [1861]. See also Mr. J. D. Mayne's *Commentary on the Indian Penal Code*, s. 628.

² *Abraham v. Abraham*, 9 Moo. I.A. 195.

as to the effect upon them. We may accordingly dismiss marriages of this class from further consideration.

The Broader Ground—A Polygamous Union.—To turn now to the broader view of the grounds of the Judge's decision, it must be admitted that there is something to be said in favour of it. It seems certainly strange that if the learned Judge meant to decide as he did simply on the ground that Bethell was a domiciled Englishman at the time of his marriage, he did not expressly say so. Further, there is a passage in his judgment which at first sight reads as if he meant to put his decision on the wider ground. After referring to Lord Brougham's *dicta* in the *Warrender* case, which we have already (p. 374) discussed, and to Lord Penzance's decision in the *Hyde* case, he says: "I conceive that, having regard to these authorities, I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it is formed on the same basis as marriages throughout Christendom, and be in its essence the voluntary union of one man and one woman to the exclusion of all others."

Conclusion as to Grounds of Decision.—I confess that when I first read the judgment, I agreed with those who take the broader view of the ground on which the decision rests; but on further reflection I have come to agree with those who take the narrower view and think that the learned Judge decided as he did merely because Bethell was domiciled in England at the time of his marriage. The circumstance that this ground is not expressly stated in the judgment may be explained by the course the argument had taken. The counsel for the infant referred to Bethell's English domicile, and admitted¹ that, if the marriage was a polygamous one, it was invalid. All their efforts were directed to showing that the marriage was not meant to be polygamous, and thus the real issue in the case was whether it was polygamous or not. On this, which was substantially an issue of fact, the Judge's attention would naturally be concentrated, and he had no occasion to trouble himself much about the law. As to the passage above extracted from his judgment, we are in no way driven to put upon it the construction put upon it by those who take the broader view, and which would make it deal with a variety of matters which the Judge was in no way called upon to consider.

The "Law of England" as Used in the Judgment.—It is submitted that when he said in effect that no non-Christian marriage was, as he expressed it, "a valid marriage according to the law of England," he was using the phrase "law of England"² in the narrower sense of the law of England governing English marriages, the essential portions of which an Englishman,

¹ P. 226 of report in *Law Reports* and p. 490 of that in *Law Journal Reports*.

² See Dicey's *Conflict*, p. 6.

like Bethell, domiciled in England, would carry with him abroad, and not in the broader sense of the law of England as including all principles of private international law which would be followed by our Courts. It seems impossible to suppose that the learned Judge could have considered that he was bound, by Lord Brougham's *dicta* and Lord Penzance's decision in the *Hyde* case, to hold that the law of England in the latter and broader sense must always and for all purposes treat a non-Christian marriage as invalid, and in particular that he would be bound by these authorities to hold that the child of a marriage contracted in their own country between members of a polygamous community there domiciled is illegitimate. Lord Penzance, as we have seen (pp. 379-80), most carefully guarded himself against being supposed to decide anything like that; and as for Lord Brougham's *dicta*, it will be seen, from what has already been said (pp. 374-6), that they could not bind any judge to hold anything.

Assuming the narrower view of the grounds of Mr. Justice Stirling's decision to be right, our general question is still a completely open one, and we must accordingly look beyond our English law reports to see whether we can find anything to throw light on it.

NOTES.

Hostilities without War.—Mr. J. S. Risley, writing on this topic, says :
“The present state of affairs in China may possibly appear at first sight to be one of considerable anomaly. A powerful and far-reaching secret society has organised an armed rising for the avowed purpose of exterminating foreigners. The Chinese Government, whilst professing to treat the ‘Boxers’ taking part in this rising as rebels, openly and actively sympathises with them ; and the Imperial troops have, beyond all doubt, taken part with the rebels in fighting against the foreign troops landed to protect the lives and property of foreign subjects. Much blood has been spilled on either side, Chinese forts and towns have been bombarded and seized, foreign diplomatic agents have been given notice to leave Peking, one of them has even been assassinated, and the fate of the rest is doubtful, and the invasion of China by the allied forces of the Western Powers has been, in fact, at any rate commenced. All these things have happened, and yet in the eye of International Law the relations of the Chinese Government and the Powers are at present (July 3) those of unbroken peace. Mr. Bumble, it may be remembered, had no very high opinion of English law, and many people of at least equal enlightenment at the present day are inclined to make a similar estimate of International Law ; yet the wisdom of the latter, as exemplified in the Chinese situation, may be shown to fall not so very far short of true wisdom after all.

“Between the conditions of Peace and War there is in modern times a breathing-space. Nations are no longer small, savage tribes who fall treacherously upon each other in the night. Civilisation has made a surprise almost impossible, and nations have developed “conscientious objections” to wholesale bloodshed. Hence national disputes more closely resemble those of individuals, and much may happen between the serving of the writ and the final hearing of the case in Court. In the litigation of States there are certain recognised methods of procedure whereby a case may be compromised without reaching the terrible final trial of war. Setting aside such entirely peaceful proceedings as negotiation, mediation, and arbitration, there remain certain forcible means, short of actual war, of hastening the termination of international disputes. Forcible retaliation for an injury usually takes the form of reprisals, embargo, or pacific blockade, and its object and inevitable result is to bring the aggressor ‘to his bearings’ and compel him to join in arriving at a peaceful settlement or else to declare war.

"Reprisals and other acts of hostility without war clearly cannot be continued for any length of time between two great civilised Powers. An 'insult to the flag' must inevitably produce enormous public excitement, and an outrage upon the national dignity must nearly always precipitate the outbreak of war. But in dealing with barbarous or semi-barbarous communities, hostilities without war may constitute a useful measure of police. By this means civilised Powers are enabled to coerce a barbarous State, whose home or foreign policy is a source of serious and imminent danger to the world at large, *without the disturbing effects on treaties, trade, and property incident to actual and declared war.* This is well illustrated by the present situation in China. The lives and property of Europeans throughout that country are placed in imminent danger by the insurrection of the Boxers, which the Chinese Government either cannot or will not suppress. The landing of troops by the Powers was, primarily, no act of reprisal for injury, but an armed intervention justified by overwhelming necessity. It was, in short, an international 'act of police,' which the Chinese Government is not obliged to resent, but may, if it sees fit, resent by declaring war on the intervening Powers. The conflict of European forces with the Chinese Imperial troops may lead to this result at any moment, and a wholesale massacre of Europeans in Peking might, similarly, lead to a declaration of war by the Powers; but until a state of war is actually recognised the relations of China with the latter must be regarded as peaceable, and their intervention merely friendly aid in securing peace and order in her territory. The foundations of English law are laid deep in the bed-rock of legal fiction, and therefore, to English lawyers at least, there should be nothing startling in the fiction that the Powers are at present engaged in assisting the Chinese Government to put down an armed insurrection of its subjects."

Egyptian Companies.—The Khedivial Government has been making a commendable effort to regulate the companies which the growing prosperity of the country and the influx of capital have created—"the swarm that in its noontide heat were born." Hitherto the promoter, unfettered by any legislation, has drawn his memorandum and articles of association pretty much as he liked, and the State Legal Department has had cast upon it the labour of discussing whether the basis of the proposed company was or was not admissible. Some general conditions of incorporation and regulation had obviously to be imposed, and this has now been done. The memorandum of association must be an official deed (*acte authentique*). The number of members must not be less than seven. Companies cannot be finally incorporated until the whole of the capital has been subscribed. Shares to be converted into bearer securities must be fully paid up. In order to authenticate the appearance on the scene of a new company the memorandum and articles are to be published in the official journal. New shares cannot be issued at a discount; if issued at a premium, the surplus must be carried to a reserve fund. The inflated price at which properties

are sold to companies by promoting syndicates—the fruitful cause of so many company frauds in this country—is met by a system of independent valuation analogous to that in France and Germany, substituted for the biased appreciations of interested vendors. Other regulations deal with the issue of the debentures, with founders' shares, and general meetings; and (which adds greatly to their authority) all have been arrived at after a careful scrutiny and comparison of other foreign systems of company law—France, Italy, Germany, Belgium, Portugal, Holland, Roumania. These regulations, however, it must be borne in mind, apply only to companies formed in Egypt. The majority of companies formed to do business in Egypt are incorporated abroad, and, being so, are—at present—independent of Egyptian control. Sir Walter Scott, in his romance of *Rob Roy*, tells us of a curious purse of the great freebooter, with a miniature pistol artfully contrived so as to shoot any one who meddled with the clasp. The mechanism was most ingenious, but, as Sir Walter observes, there was nothing to prevent the thief from ripping open the pouch with a knife without risk from the pistol. The promoter will no doubt keep out of range in the same way. But it would be very simple to give check by imposing, as most countries now do, conditions on immigrant corporations.

The Law of Nature.—Primitive systems of law and custom are but rude attempts to outline elementary rights, and so to save society from becoming a "wild waste of passion." They owe their expansion and progressive refinement to their coming in contact with an environment of larger, loftier, and more enlightened ideas, and the law of nature is perhaps as good a phrase as can be found to sum up these invigorating ideas—"evolution ever climbing after some ideal good." We may see the process illustrated in the history of many nations—in the moral and spiritual principles of Christianity influencing the hardness and narrowness of the old Jewish law. We may see it in the case of Rome in the influence of the Prætor's administration of the *jus gentium*, and later of the Stoic doctrine of right reason—a scintilla of that world reason (*mens universi*) which the Stoics postulated. We may see it in our own country in the engrafting of equity on the old rude stock of the Common Law, a development presupposing the existence of an ideal justice to which our actual systems are ever approximating. In modern times the influence of this law of nature may be seen, as Sir Frederick Pollock has lately pointed out, in the tendency on the part of our law to appeal to a general idea of reasonableness residing in the breasts of the twelve jurymen who typify the common sense of the community. This is what Lord Hobhouse meant when he said that "juries have kept our laws sweet," they have kept them in touch with human life and "right reason." The model trustee—the ideal prudent man of business that equity judges are so fond of parading—is traceable to the same source. For a wide extended Empire like ours, with its varied systems of law and native custom, Hindu, Mahomedan, Parsee, Chinese, this law of nature has a very real

significance, because it is only by the good sense of our judges acting in the light of it—in that natural equity which the law proclaims—that the problems which are ever growing out of the conflict of systems can be successfully solved, and can be made to contribute to the unity of the Empire.

The Summary Punishment of Perjury in Gambia.—Mr. J. Rennor Maxwell, who for many years occupied a place on the judicial bench of Gambia, in a communication to the JOURNAL OF COMPARATIVE LEGISLATION calls attention to the danger to the community of the laws which, in recent years, have been passed in some Crown Colonies, conferring on Judges and even on petty magistrates the power of committing witnesses to prison for perjury—or rather on suspicion of perjury—as for contempt of Court, *without trial*. “This legalised danger,” says the writer, “originated in Hong Kong, but has now extended to Ceylon, Sierra Leone, the Gold Coast Colony, and Lagos. To expose the unwisdom of these summary powers I will state the law of perjury and the summary procedure in perjury as they exist in the Colony in which I am now resident—the Gold Coast Colony. The definition of perjury in the Criminal Code of the Colony, (Ordinance No. 12 of 1892) is as follows :

“A person is guilty of perjury if, in any written or verbal statement made or verified by him upon oath before any Court or public officer, he states anything which he knows to be false, or which he has not reason to believe to be true (s. 382).

“A person can be guilty of perjury by swearing that he believes a thing which he does not in fact believe, (s. 383).

“This is the present substantive law of perjury in the Gold Coast Colony. There is no necessity, according to Gold Coast Law, to prove in a trial for perjury that the matter falsely sworn to was material to the issues, or that the Court was one of competent jurisdiction ; nor is it clear from the enactments that the false oath must have been wilfully, corruptly, and deliberately taken ; nor that the proceedings in which it was taken were of a judicial nature. The adjective law is even more objectionable.”

“S. 44 of the Criminal Procedure Ordinance 1876—imported into West Africa in the early nineties—enacts as follows :

“(1) The Court, if it appears to it that a person has been guilty of perjury in any proceeding before it, may,

“(a) Commit him for trial upon information for perjury, and bind any person by recognisance to give evidence at such trial ; or

“(b) Commit him to prison as for a contempt of Court for six months with or without hard labour ; or

“(c) Fine him a sum of fifty pounds.

“(2) This section is subject to the following limitations :

“(a) If a District Commissioner order a person to be imprisoned or to pay a fine, he shall, within three days, forward to the Chief Justice a certified

copy of the notes of the proceedings, and the Chief Justice may, without hearing any argument, vary or set aside such order.

"(b) Any imprisonment or fine ordered or imposed under this section shall be a bar to any other proceedings for the same offence, except in the case where the order of the Commissioner is set aside by the Chief Justice.

"(c) A District Commissioner may not impose imprisonment for more than three months, or a fine of more than twenty-five pounds under this section.

"Under this section the Court may commit a man to prison, or fine him on the bare suspicion of perjury—If it appears to it": and without the testimony of even a single witness, though English Law requires at least two to convict on an indictment for perjury. The result is to make the witness-box a terror to the nervous witness, to cause reticence from over-caution, and so to prejudice in the end the interests of justice.

"Then there is the danger in the case of illiterate witnesses giving evidence through an interpreter. During the short period since I resumed residence in the Gold Coast Colony, I have observed how jealous some of the Gold Coast magistrates are of what they consider their right to be guided solely by the interpretation of their official interpreter. I have seen counsel rebuked for suggesting on very good authority that an official interpreter who was interpreting in what was to him a foreign language, might have been mistaken in his interpretation. As the English magistrates do not speak the native languages, is it equitable that they should have the power of ordering a man to prison, not only on suspicion, but on suspicion founded on hearsay evidence? If the witness had been committed for trial, he might, at the trial, have been able to satisfy the tribunal that the interpreter failed to convey to the Court what he did actually say. With Judges of the judicial calibre of Sir W. B. Griffith, the present Chief Justice, and his learned puisnes on the Bench, there is no danger of these summary powers being abused, but in the hands of less able and upright Judges they might easily be. The absence of any public opinion in some of the Crown Colonies where these powers are operative is a very important factor in the situation."

Married Women's Property in Babylon.—Professor Sayce, in his new volume, *Babylonians and Assyrians*, mentions one or two facts about the law of husband and wife which show that at a very early age that law had reached in ancient Babylon a high state of development. "One of the documents that have come down to us from the age of Abraham records the gift of a female slave by a husband to his wife. The right of the woman to hold private property of her own, over which the male heirs had no control, was early recognised by the law. In later times it is referred to in numberless contracts." Her property, which in a commercial community, such as Babylon was, consisted chiefly of personalty, belonged to her. Assyrian women seem to have enjoyed almost as many privileges as the Babylonian. They could hold civil offices, and even act as governors of cities. The Married Women's Property Act had been anticipated 500 B.C. and earlier. A married woman

not only retained the property in her dowry; she could dispose of whatever came to her by inheritance, or gifts, or profits in business, and, still more remarkable liberty, she could freely adopt children. There is one curious feature of the law which Professor Sayce does not entirely clear up: a second marriage invalidated the first if the first wife was still living. And this in a country in which polygamy was recognised! The book, like all the best recent contributions to the history of early institutions and law, is calculated to inspire caution in making generalisations as to the constitution of ancient societies. As far back as the archæologist can go in the study of ancient Babylon, the individual, not the family, is the unit in the commonwealth. A natural consequence was the early development of the will. Scholars, such as Dr. Oppert and Professor Sayce, have done much to clear up the legal systems of Babylon and Assyria. But when shall we have a collection of typical ancient legal instruments?

Animals and their Rights.—Is there any juridical relation (*société juridique*), asks M. Henri Rolin in the *Revue de Droit International et de Législation Comparée*, between men and animals? Have animals, like ourselves, positive rights sanctioned by the sovereign power? As a rule, people would not hesitate to say, no! Right in their estimation exists only for men, and if the law protects animals against acts of brutality, and punishes such acts, it does so solely in the interest of men. Those are the only rights it has in view. M. Engelhardt, in his recent work, *De l'Animalité et de son Droit*, does not subscribe to this view, nor does his reviewer. M. Engelhardt pictures "la société nationale," "la société internationale," and finally "la grande société de tout le genre humain," as forming three concentric circles; and he asks why we should not conceive of a fourth circle with a larger orbit still embracing animals. This animal jurisprudence, M. Engelhardt admits, has not yet organised itself, but it is tending to do so.

M. Engelhardt points out in the first part of his book how near animals are to us physically, intellectually, and morally: we treat them, he says, almost like poor relations (*des parents pauvres*). Evolutionary biology and pathetic anecdote have alike helped to lower our pride. In the second part M. Engelhardt goes on to show the power of the sentiment which is struggling to save animals from suffering: a power evidenced by the existence of no less than 1009 societies for their protection. The crucial question still remains: Have the laws which have been passed been inspired by regard for the moral education of men merely, or by a sentiment of pity for the animals themselves, by the idea of a common origin between them and man, by the conviction that according to natural law they really have rights? Once prove that animals are protected for their own sakes, and we must admit that they have positive rights, though, like children, they may be unconscious of them, and though such rights have to be vindicated for them indirectly. Thus "a new planet swims into our ken." It is a large vista which M. Engelhardt opens, in claiming this new territory for juridical

science, but he has behind him the forces of progress and humanity, and the encouragement of many a conquered province.

Mining Leases and Subterranean Dragons in China.—Mining leases are in all countries full of complex covenants; but nowhere out of China have the lessor and lessee to provide for disturbances of working by earth spirits and subterranean dragons. In the mining concession, lately granted by the Chinese Government to Mr. Pritchard Morgan for mining in the province of Szechuen, there is a clause to this effect: "In excavating, so long as the mines dug below the surface are not injurious to the soil above, rascals are not allowed to obstruct the work on the ground that it is injurious to the Fêng Shui (the earth spirit)."

The Revision of Case Law in America.—The burden of Case Law presses even more heavily on American than on English lawyers. In the *American Law Review*, Vol. 34, p. 392, Mr. E. Payson offers some suggestions for its abatement. He does not go quite so far as Lord Campbell, and recommend a decennial *auto da fé*; he is for "sieving" cases—an abridgment of the Reports by a Case Law Revision Committee analogous to our Statute Law Revision Committee. All growth, as he justly says, implies much waste material, and the growth of law is no exception. Why should so much of this waste product be preserved—the details of experience reproduced in endless repetitions? Elsewhere a gradual synthesis of experience into rules and generalisations extricates most that is useful and permanent, purging the dross: why not a similar elimination from Case Law of what is obsolete, false, useless, or mere repetition—in fact, an up-to-date revision by an authoritative body? Think of the saving of the time now spent in Court over canvassing authorities; of the emancipation, too, of the lawyer, from the drudgery of ransacking thousands of volumes, and reconciling contradictory cases! Much might undoubtedly be done in this way to systematise and rationalise the heterogeneous mass of Case Law, and to prepare the way for a code. Much has, in fact, been done in England by the *Consolidated Digest of English Case Law* (Mr. Mews's), but it has not been done authoritatively. In Mr. Payson's scheme the Revision Committee would be armed, it is presumed, with full powers to use, not only the pruning-knife, but, as Mr. Puff would say, the axe. Would these powers be conceded? There is this also to be remembered: that one of the most remarkable characteristics of American and English Law is its continuity, and it is only the historical method of studying case law which gives an insight into the true principles of its evolution.

Railway Companies and Negligence.—To railway companies belongs mainly the expensive privilege of developing the law of negligence. The difficulty in most of these cases is in drawing the line between suggestions of possible precautions and actual negligence. This difficulty was illustrated in a recent Canadian case (*Wood v. Canadian Pacific Railway Co.*, 30 R.S.C. of Canada 110). The company there had allowed the road-bed

to become overgrown with grass and weeds; a porter was coupling two cars, and in getting from between them as the engine backed in, he caught his foot in the grass and weeds, and was struck by the train and sustained serious injuries. But it is not because an employé is injured that the company is liable for negligence. It is not bound to make provision for every possible contingency: "lex non cogit ad impossibilia;" so to hold would make its position intolerable. It is only bound to guard against dangers which are apparent to any person of average intelligence. A track overgrown with weeds is not attended with obvious dangers. The English case most like this is *Crafter v. The Metropolitan Railway Co.* (L.R. 1 C.P. 300), where a passenger slipped on a flight of stairs leading from the high-road to the company's station in consequence of the stairs being bound with brass and worn by traffic. It was argued that the company might have used lead instead of brass, might have provided a handrail, and so on; but "might" is not to be translated to mean "ought." The human imagination, whether it is that of directors or other persons, is not endowed—providentially—with a vision of all possibilities of danger, or set the impossible task of providing against them.

Hong Kong and the "Bully."—The "bully," "fancy-man," or "souteneur" has become recognised as a social pest of the worst kind; and not only the United Kingdom, but colony after colony has been legislating for his extermination. The most drastic measure is that passed this year by the Legislative Council of Hong Kong. By this Ordinance "every male person who knowingly lives wholly or in part on the proceeds of prostitution" is made liable on conviction to imprisonment for any term not exceeding three months, with or without hard labour; but the distinctive character of the legislation consists in the provisions for facilitating conviction. Thus a magistrate is empowered by (s. 8 [2]), in case of a suspected house, to issue a search warrant and arrest the offender; and under (3) comes the following: "When a male person is proved to live with, or to be habitually in the company of a prostitute, and has no visible means of subsistence, he shall, unless he can satisfy the Court to the contrary, be deemed to be knowingly living on the earnings of prostitution." This presumption meets what is a serious impediment in the way of enforcing the law—the difficulty of getting evidence from the oppressed against their tyrants. A still more effectual remedy provided by the Ordinance is banishment by an order of the Governor-in-Council in the case of persons convicted under the Ordinance not being natural-born or naturalised British subjects.

Codification of the Commercial Law of the Empire.—It is earnestly to be hoped that the resolution of Lord Avebury at the recent Congress of Chambers of Commerce of the Empire, and his remarks in moving it, will bear fruit. The resolution was in these terms:

That the Bills of Exchange Act of 1882, the Partnership Act of 1890, and the Sale of Goods Act of 1893, and other Statutes, having shown the practicability

and advantage of assimilating and codifying British Commercial Laws, it is highly expedient that the Commercial Laws of the whole British Empire should be assimilated and ultimately codified, and the Government be memorialised by this Congress to take the necessary steps to appoint, for these purposes, a Commission on which the United Kingdom and all the Colonies and countries embraced in the Empire should be duly represented.

In moving the resolution, Lord Avebury said: "I might just illustrate what we think would be the advantages of this course by making a few remarks upon what happened with reference to the Bills of Exchange Act. Before that portion of the codification of the Commercial Law of the Empire took place, the law relating to bills of exchange and cheques was scattered through a very large number of Acts of Parliament and a still greater number of legal decisions, which it was almost impossible for any man of business to carry in his head or to have the opportunity of referring to. In the second place, there were a good many—I do not say a very large number—but there were a good many points in which the Commercial Law of England, Scotland, and Ireland differed from one another. And in the third place, there were several questions as to which the law had not pronounced, and with reference to which the best legal advisers could only say that the law was still quite uncertain. Although, naturally, these points dealt with questions which were not likely to arise very often, still they were questions which might involve many thousands of pounds, and might lead to very great commercial suffering. And then, lastly, there were some points on which the Courts had decided questions brought before them—and I have no doubt with quite legal accuracy—but in a manner which was entirely inconsistent with what was thought best by the entire mercantile community. The London Chamber of Commerce, therefore, had a Bill drafted which dealt with the whole of the law relating to bills of exchange and cheques, and that was referred by the House of Commons to a very strong Committee. We discussed it at considerable length. We were able in almost all cases to assimilate the law of the three kingdoms together. In some cases our Scotch friends took the law as it existed in England; in others we took the law as it existed in Scotland; but I may say that in no single point did we consider whether it was Scotch Law or whether it was English Law—the one principle which guided us was whether it was the law which would be the most convenient to the mercantile community generally. The result of that Committee was that at length the Bill became an Act of Parliament, and it has been found unnecessary to make any changes in it. Legal actions have been very much diminished, because the law has been made clearer and more accessible; and I believe that I am correct in saying that the same Act has been adopted in several of our self-governing Colonies, so that it has not only become the law of the United Kingdom, but of many other parts of the British Empire also. I think, Mr. President and Gentlemen, it is almost self-evident that there

must be great commercial advantages in extending this principle to other departments, and in carrying the principle of codification farther than it has gone at present and following the example which has been adopted and set before us in the three Acts which are mentioned in this resolution. We are here as men of business and as practical men, and we have a great many other questions before us. I have heard of no difference of opinion with reference to the particular resolution which I have now the honour of moving, and I think, therefore, that under those circumstances I should be unjustifiably intruding on your time if I were to go into any detail in laying this resolution before you." The resolution was carried unanimously.¹

Trusts in the United States.—In *The Quarterly Journal of Economics* is an account by Mr. R. C. Davis of "Judicial Decisions on Statutes prohibiting Combinations and Trusts." The Sherman Anti-Trust Law of 1890 was one of the first of a series of Acts adopted in twenty-seven States and territories intended to prohibit industrial combinations called trusts. The Supreme Court has held that such legislation does not contravene the fifth and fourteenth amendments to the Constitution of the United States. At first there was a reluctance to go beyond the Common Law. But recent decisions give full effect to the popular idea of the intention of the Legislature. "We have," says Mr. Davis, "two decisions of the Supreme Court which distinctly lay down the principle that the language of the Act is to be construed in accordance with its evident intention; and contracts or agreements which are in restraint of trade in inter-State commerce, whether reasonable or unreasonable, are illegal, and are subject to injunction or to criminal prosecution under the Act." Meantime some of the great trusts, or "combines," are suffering from two evils even more serious than the Anti-Trust Law—over-capitalisation and heavy State taxation.

What is Neutrality?—In a recent number of the *Journal du Droit International Privé* is a *causerie* on the question of neutrality by M. Féraud-Giraud, Honorary President of the Cour de Cassation. It deals with a topic of living interest. Is it an answer to a neutral charged with favouring a particular belligerent to say, What I do for A. B. would be a breach of neutrality but for a treaty. I act as I do in virtue of an agreement made before war broke out. M. Féraud-Giraud thinks this no answer. "Il me paraît impossible d'accepter aujourd'hui, en ce qui concerne les conséquences de faits portant atteinte à la neutralité, qu'on établisse une différence entre ces faits, suivant qu'ils se produiraient en vertu d'accords anciens antérieurs à l'ouverture des hostilités, ou en vertu de conventions postérieures à la déclaration de guerre." Either such agreements are made with reference to a time of peace, and as such inapplicable to a time of war, or they are made in view of hostilities—they record a resolution not to be neutral.

¹ For history of the movement of codification of Commercial Law, see the *Nineteenth Century*, May 1900, p. 860.

The Historical School of Jurisprudence.—In a brochure entitled *Le Droit Pénal Anglo-Indien*, Dr. Speyer describes the Indian Criminal Code, its history and characteristics. He sees in it a brilliant application of the theories of Bentham's school, he bears testimony to its success, and he is enthusiastic over the fact that it governs the relations of about two hundred millions of persons differing as much from each other as Spaniards from Esquimaux—a multitude more heterogeneous than the whole of Europe. Dr. Speyer draws from the facts which he narrates the conclusion that the historical school of jurists, such as Savigny, were much too dogmatic when they asserted that every legislative reform ought to be the spontaneous emanation of the mind of the nation and the result of a progressive evolution of law, and when they condemned all reforms involving the substitution of a foreign system. Has not too much importance, Dr. Speyer asks, been attached in regard to Criminal Law to the differences between men and men? In this connection may be mentioned the interesting paper in the last number of the *Jahrbuch* of the *Internationale Vereinigung für Vergleichende Rechtswissenschaft*, in which Dr. Fritz Stier-Somlo examines historically and analytically, with novelty and freshness, a problem which, since the days of Savigny and Puchta, has been prominent in German jurisprudence—*die Volksüberzeugung als Rechtsquelle*. What they and their successors meant when they said that one of the chief sources of law was the popular sentiment, conviction, or opinion, was never very clear. Dr. Stier-Somlo traces the genealogy of the idea up to Schelling, from whom Puchta borrowed it, importing it into jurisprudence and making it a feature of the doctrine of the historical school. The analysis of the facts which Savigny had in his mind leads the author of the paper to the conclusion that this "mysterious entity" (*Volksüberzeugung*) is not a true source of law. We are not concerned to state Dr. Stier-Somlo's own theory, but his paper is one of many indications of the declining sway of the historical school in its early home.

Adoption in Indian Law.—The *Bombay Law Reporter*, in its review of Indian cases decided last year, refers to the many recent decisions on the subject of adoption. Beginning with the famous decision of the Privy Council to the effect that the adoption of an only son is not invalid—thus overruling the opinions expressed by two High Courts—it is remarked that several important points, more or less open, have lately been covered by decision. For example, the Bombay High Court has held that the Datta Homa ceremony is not essential to the validity of the adoption of a brother's son, even though the parties be members of one of the three regenerate classes, or when the adoptee is of the same *gotra* as the adopter. The Judicial Committee has also decided that A. may "associate" one of his wives with a child who is adopted, so that she becomes the mother, for purposes of inheritance, to the exclusion of other wives. All these decisions suggest the reflection how imperfect was the old law of adoption, how silent the few texts are as to cases certain to occur, and

how it has been left to courts and text-writers in recent times to eke out by analogy the gaps in primitive law.

Pensions and the Doctrine of "Ultra Vires."—The doctrine of *ultra vires*, or keeping a corporation to its proper objects, is one entirely consonant with common sense and public policy. Incorporation is a privilege granted by the State for defined purposes, and any *ultra vires* acts are an abuse of the privilege. Besides which, members have embarked their money on the faith of its being applied to the objects specified, and to no others. But the doctrine is one which, as Lord Selborne said, is to be reasonably and not unreasonably understood and applied; and whatever may fairly be regarded as incidental to or consequent upon those things which the Legislature has authorised ought not—unless expressly prohibited—to be held by judicial construction to be *ultra vires*. The doctrine, in other words, must not be converted into a commercial strait-waistcoat. On this enlarged principle of interpretation it has been held in England that a fire insurance company is not acting *ultra vires* in paying a loss by fire, though not among the risks covered by the policy, liberality of dealing in such cases being beneficial to the company's business. Similarly, it has been held that a trading company may give reasonable gratuities to its servants as an encouragement to faithful service. It is satisfactory to find the same policy of enlightened common sense governing the judicial view of companies' powers in New South Wales. The particular case was one of a Mutual Provident Society doing business on a very large scale, and the question was whether the society could apply a sum of £25,000 out of its funds to form a superannuation fund by virtue of a power in its Act of Incorporation to make bye-laws generally "for the efficient management of the affairs and business of the society." The Court unhesitatingly came to the conclusion that it could. The success of such a society, as the Court pointed out, is mainly dependent upon the skill, ability, fidelity, and integrity of its officers, and it is of great importance for it to retain and attach to its service trained, competent, and reliable servants, who might otherwise be enticed away by rival societies, and irremediable injury thus done to the society's business. In the present struggle for existence the prospect of a pension is becoming more and more a determining factor.

Englishwomen and Mohammedan Marriages.—It is clear that the study of Comparative Law is a desideratum for the fair sex as much as for any Dryasdust lawyer. There may be some Englishwomen content to share the privileges of matrimony with three or four other wives, and to have the matrimonial knot severed at any moment by their husband at his own pleasure, without cause shown or any judicial intervention whatever; but intending wives ought certainly to know what is in prospect before they commit themselves to this precarious form of union approved by the Koran, which to English notions is not much better than the mock marriage before the sham clergyman familiar in romance. The Report of the Egyptian

Ministry of Justice calls attention to the danger of these mixed marriages before the religious jurisdictions. An Englishwoman, for instance, fresh from home and entirely ignorant of local law and customs, goes through a form of marriage before the Cadi with some Egyptian gentleman, is presented with an imposing-looking document purporting to be her marriage-lines, and imagines herself—until disillusioned—as securely and irrevocably united to him as if the ceremony had been performed in London by an English clergyman. It is satisfactory, therefore, to find that by an arrangement with the Grand Cadi the Mazouns of all the Mehkémés are instructed—whenever they are asked to unite a Christian or Jewish woman to a Musulman—to insist upon her personal attendance before them, and explain to her the provisions of the Koranic Law concerning polygamy and divorce before they permit her to sign the register. If after the “Wull ye venture?” of the Scotch minister, addressed to them in this form, they elect to go on, they have only themselves to thank for the consequences. The danger is one not confined to Egypt. Periodically there come warnings from the British chaplain in Paris concerning marriages of Englishwomen with Frenchmen; there was one only the other day in the case of marriages with Frenchmen in England. The clergy ought to know, says the chaplain, that those contracting such a marriage should bring a certificate from the French consul in London, or where the marriage takes place, to state that there is no impediment to the marriage in France in the shape of a refusal by the parents to consent, or some other unfulfilled condition precedent.

Law and Public Opinion.—“Law so dry! I deny it,” said Lord Bramwell stoutly. So does Professor Dicey, and his lecture on Law and Public Opinion is itself a refutation of the vulgar error. Perhaps it is none the worse for some waves of Platonic paradox. We may surmount the first without much difficulty, that man—the so-called rational animal—does not act from reason; but can he be said either to act, as Mr. Dicey would have it, from the “logic of facts,” the combination of reason, and the circumstances of the time? Is it not much more true to describe the chariot as whirled along in the Platonic metaphor by the black horse and the white horse with what control the charioteer of reason is able to exert? *Διανόια οὐδὲν κινεῖ*. It is the strong, deep, divine currents of human sympathy and moral aspiration which have made and are making the law, though reason may have helped to mould it into form. So-called public opinion is mostly made up of public sentiment. Another paradox of Mr. Dicey’s is that the first twenty years of this century, what he terms the period of Blackstonian optimism and fear of change, was a period of stagnation. But what of Bentham and James Mill, of Sir James Mackintosh and Brougham and Sir Samuel Romilly? The stream was swelling, though the official ice had not begun to crack. The most curious of Mr. Dicey’s paradoxes is that our legislators, the elderly men of mature judgment, represent the public opinion of thirty or forty years back. The reasons on which they act, says the critic, are those

which they heard from their fathers. The present opinions they hear from their sons, but they pay little attention. This petrification of the legislative mind is so startling a theory that we must wait for Mr. Dicey to develop it more fully.

Heroic Social Remedies.—A writer in the American *Journal of Sociology*, contemplating the Sisyphean struggle with evil, discusses a heroic remedy—to wit, the prevention of progeny of certain classes of the criminal and degenerate. "This method," says the writer, "is highly commended and strenuously urged by competent persons in many lands—notably in England, Germany, and the United States. From the standpoint of private and public right and welfare the use of castration for the purpose in question is certainly not indefensible. The right of Society to protect itself by isolating for a considerable time, and for life if need be, the insane, the epileptic, the leprous, and the criminal is unquestioned. If in self-defence it may deprive these of the exercise of all powers for an indefinite time, or for all time, it is difficult to see why the same right does not warrant it in depriving certain classes of a single power which they can never exert save to the hurt of all concerned."

Customs among the Jains.—In regard to law, customs, religion, and (as is shown in a paper in the *Imperial and Asiatic Quarterly*) philosophy, there are in India no more interesting communities than those of the Jains. A long series of decisions has been given in respect to the customs of inheritance, etc., among them. The question has generally been whether the Mitakshara prevailed among them, or whether there exist among them certain customs as to inheritance or adoption which must be judicially recognised. In *Harnab Pershad v. Mandil Dass*, reported in a recent number of the *Calcutta Law Reports*, the point to be decided was whether customs recognised among the Jains in one place were admissible as evidence of the existence of these customs in another place, and whether a childless Jain widow might adopt a son without the permission of her husband or his kinsman. The Court decided affirmatively, and in doing so it made some interesting remarks on the position, customs, religion, and ceremonies of the Jains. As is well known, though of Hindu origin, and in general conforming to Hindu law, they do not recognise the divine authority of the Vedas, and they do not practise the *stradh*, or ceremony, of the dead. It has long been accepted law, said the Court, "that in the absence of proof of special customs, the ordinary Hindu law must be assumed to prevail as among the Jains (see case of *Chotay Lall*). . . . We see in the evidence no sufficient foundation for the contention that there is any difference in the customs observed at places east and west of Cawnpur. . . . It may be conceded that in ceremonials the practices vary at different places, and even in Arrah itself, and that the views of some Jains are much stricter than those of others. It may be conceded also that their ceremonies in many respects approximate pretty closely to those of the orthodox Hindus, although

this is not confined to Arrah itself. The reason is pretty obvious. The Jains have no written *shastras* and no priests of their own. Brahmans are called in to officiate at their ceremonies, and it is only natural that they should perform the ceremonies with which they are best acquainted. . . . There is this fundamental distinction between the Jains and the orthodox Hindus, that their belief in the nature of the future state is wholly different. A son among the Jains confers no spiritual benefit on the state of his deceased father, and the Jains do not believe in or observe the *stradh* ceremony as it is observed by the orthodox Hindus. Some Jains also may worship or do homage to some of the Hindu deities, but they have their separate temples which no orthodox Hindu would enter, and their separate deities whom no orthodox Hindu would worship. Mere approximation in the observance of ritual or ceremonial does not, therefore, do away with the difference which exists between them, and we see nothing to differentiate the Jains at Arrah from the Jains elsewhere, as regards the observance of any customs peculiar to them, or, indeed, in any other respect save perhaps this, that where the Jain communities are larger and more connected, there may be less of the ordinary Hindu ritual."

Reciprocity of Matrimonial Obligations.—"Per iniquum enim videtur esse ut pudicitiam vir ab uxore exigat quam ipse non exhibeat." Thus the Roman jurist! The sentiment is not strictly accepted by our law. But the general principle is fully accepted by English law in this sense, that marriage is recognised as a contract of reciprocal obligations, and that one spouse cannot disclaim such matrimonial obligations and yet hold the other to them. This mutuality has been recently illustrated by two cases, one in our own Court and the other in the Cour Supérieure de Québec (*Gibson v. Patrick*, vol. xvi., p. 504). In the Quebec case the wife had sued for a separation and her suit had been dismissed; but instead of docilely returning to live with her husband she abandoned the conjugal home, and then some years afterwards (*splendide audax*!) registered her claim for dower against the immovables of her husband! Marriage would be a very one-sided affair if this feminine manoeuvre had been successful; but it was not, and the Quebec Court, without any compunction, told the lady that if she did not return to the *domicile conjugal* within thirty days she would forfeit all the rights and advantages of marriage, and in particular the registration of the dower would be vacated. In the English case, *Synge v. Synge*, the wife took up a no less anti-connubial attitude. "I will live with you," she said in effect, "provided you are a husband only in name; otherwise not;" and when the husband refused these novel conditions she charged him with desertion. A wife may have reasonable grounds for refusing her husband marital rights, but the desire to shine on the stage is not one of them.

Medical Practice and the Sale of Quack Medicines.—The vendor of quack medicines interferes, there can be no doubt, with the business of the regular medical practitioner, and this being so, it is not unnatural

that the Medical Council of Quebec should declare war upon him. But it is one thing to set the law in force against such a vendor, and another to organise a plot like that in *Collège des Médecins v. Tucker* (17 Quebec R.J. p. 70). Picture three "*malades imaginaires*" hypocritically going to the vendor of quack medicines, one complaining of his stomach, another of a bad arm, and the third of a pain behind his ear, and inviting the aforesaid vendor to prescribe for them. Had he done so—diagnosed their symptoms—he would have fallen into the trap, for he would in that case, have been "*convaincue d'y avoir pratiqué la médecine*," within Article 3998 of the Revised Statutes of Quebec, and been liable to the penalty of \$50, or in default, the imprisonment prescribed by the article. In a rather similar case in England (*Apothecaries Co. v. Nottingham*, 34 L.T. 76) of a chemist who was not a certified apothecary, the drug dispenser did fall a victim. Some customers came and asked him what was good for their ailments: he suggested medicine, made it up, and sold it to them; and it was held that in so doing he was acting and practising as an apothecary, and was liable to a penalty under the Apothecaries Act. The Quebec case turned on whether the vendor of the quack medicine had in fact diagnosed the ailments of the sham patients or not. They said he had; he said he had not. In this conflict of evidence the Court very properly was not disposed to let the evidence of persons who had been employed to get up a case, and who were to share the penalty when recovered, turn the scale. There is, *primâ facie*, a wide difference between selling and prescribing. A man in a free country like England or Canada may sell what he likes—quack medicines included. The sale of such medicines may do a certain amount of mischief, no doubt: so may the sale of intoxicating liquors or of trashy literature. But all medicinal virtue is not comprised in the British Pharmacopœia, nor has the State yet reached the socialistic ideal of grandmotherly care by prescribing to its citizens their proper physic.

Judicial Statistics and the Colonies.—The *Times*, in a leading article on the latest "Judicial Statistics" for England, has some remarks well worthy of attention:—"In reference to the Colonies," says the writer, "a suggestion may here be made. In recent years, thanks chiefly to the Home Office, the judicial statistics of England, Ireland, and Scotland have been assimilated. Why should not the same be done as to the Colonies? Many of their returns in their present forms are barely intelligible; and it is impossible, owing to the variety of methods adopted, to compare the figures for different Colonies. The Society of Comparative Legislation might do something to induce the Colonies to agree upon a uniform method of recording the facts of their legal systems." This suggestion is a good one, and will engage the attention of the Society. The larger the field from which statistics are drawn, the greater their value; but to widen the field without securing the trustworthiness of the data is merely to multiply the chances of error.

The Congress of Comparative Law at Paris.—The Society of Comparative Legislation having been cordially invited by the *Société de Législation Comparée* to send representatives to the Congress of Comparative Law at Paris, Sir Frederick Pollock, Mr. Montague Crackanthorpe, Dr. Schuster, and Mr. T. Barclay were appointed representatives of the Society at the Congress. The following letters from Professor Saleilles to Lord Russell will be read with interest :—

PARIS, 10 BIS, RUE DU PRÉ AUX CLERCS,
5. V. 1900.

MY LORD,—

La Société française de Législation Comparée vient de prendre l'initiative d'un Congrès de Droit Comparé qui se tiendra à Paris du 31 juillet au 4 août prochain.

Le but de ce Congrès ainsi que son programme vous seront indiqués par la circulaire publiée par le Comité du Congrès, et que je vous fais adresser.

Mais nous avons voulu, à l'égard de la Société dont vous êtes le Président, et qui poursuit le même but scientifique que la nôtre, ne pas nous contenter de cet envoi impersonnel, et je suis chargé par le Président de notre Congrès, M. George Picot, de l'Institut, et par le Comité d'organisation du Congrès, de vous adresser à vous personnellement, My Lord, et, par votre intermédiaire, à tous les membres de votre Société, l'invitation très pressante et très respectueuse de la Société française de Législation Comparée de Paris.

Le Congrès dont nous avons pris l'initiative aura d'abord pour premier objet de rapprocher tous ceux qui, dans la domaine de la science juridique, s'occupent de Législation Comparée, et tous ceux par conséquent qui veulent donner à cette comparaison des Législations une place de plus en plus grande dans le développement de la science du droit.

Peut-être aura-t-il pour conséquence de provoquer d'autres Congrès internationaux similaires de la part des Sociétés étrangères analogues à la nôtre. C'est pourquoi, en dehors de toute autre préoccupation, notre Société a voulu, avant tout, que sa première invitation officielle fût pour la Société anglaise de Droit Comparé ; et en dehors même du but scientifique et professionnel que je viens de vous exposer, vous voudrez bien voir là, My Lord, l'expression très sincère du sentiment de cordiale confraternité dont notre Société est arrivé vis-à-vis de la Société que vous représentez.

Notre Congrès fait œuvre de science exclusivement ; et sur ce terrain peut-être aurions-nous la prétention de faire oublier très des malentendus que les passions politiques expliquent, sans toujours les excuser. C'est dans ce but surtout que, après avoir insisté sur l'œuvre scientifique que nous poursuivons et au nom de laquelle nous vous invitons, j'ai pris la liberté de laisser entrevoir les sentiments de haute et respectueuse sympathie dont notre démarche voudrait être la très sincère et très cordiale manifestation.

Il va de soi que les membres de la *Society of Comparative Legislation* qui

voudraient nous faire l'honneur de l'inscrire comme tels et à ce titre à notre Congrès seraient considérés comme nos invités, et n'auraient pas à payer la cotisation fixée par notre règlement.

Si vous désirez un certain nombre de nos circulaires pour communiquer aux membres de votre Société, je vous prierais de me faire dire le nombre qu'il y aurait à vous faire adresser.

Je vous prie doux, My Lord, de vouloir bien transmettre notre invitation à la Société dont vous êtes le Président, en lui demandant de vouloir bien nous envoyer quelques-uns de ses membres que la représentent.

Et je vous demande, My Lord, d'agréer l'expression de mes plus respectueux hommages.

R. SALEILLES,

Professeur à la Faculté de Droit de l'Université de Paris.

PARIS, 10 BIS, RUE DU PRÉ AUX CLERCS,

5. v. 1900.

MONSIEUR LE PRÉSIDENT,—

En vous remerciant du gracieux accueil que vous avez bien voulu faire à notre invitation, j'ai à m'excuser tout d'abord de ma mauvaise écriture et des difficultés dont elle a pu être cause. La réponse qu'elles nous ont value et si gracieusement adressée à notre Président nous a profondément touché. Je l'ai transmise à Monsieur George Picot, qui vous en dira lui-même tous ses remerciements. En attendant, il m'a chargé de vous transmettre les renseignements que vous voulez bien nous demander. Et vous m'excuserez, cette fois encore, de passer par votre haute intermédiaire, n'ayant pas l'adresse du Secrétaire de votre Société.

Le Congrès de Droit Comparé qui doit s'ouvrir à Paris le 31 juillet, est organisé en effet par la Société française de Législation Comparée. La Société de Législation Comparée a été fondée à Paris en 1869 par Ed. Laboulaye, le grand publiciste bien connu ; elle compte actuellement près de 800 membres titulaires ou correspondants, dont un grand nombre d'étrangers. Pour l'Angleterre, en particulier, nous avons l'honneur de compter parmi nos membres, Sir Frédéric Pollock, Right Hon. J. B. Balfour, Sir Alfred Wills, J. Westlake, etc., etc.

Les ressources de la Société sont fournies exclusivement par le montant des cotisations payées par les membres de la Société, la cotisation étant de vingt francs par an ; nous ne recevons aucune subvention de l'Etat.

Les fonds de la Société sont consacrés à des traductions et publications de Lois Etrangères. Elle publie chaque année deux annuaires, l'un de deux à trois cents pages consacré aux Lois françaises parues dans l'année, l'autre de plus de huit cents pages contenant toutes les principales Lois Etrangères de l'année traduites et annotées. En dehors de ces publications, la Société fait paraître au cours de l'année un Bulletin mensuel consacré au Compte rendu des Séances et réunions de la Société. Dans ces réunions, qui ont lieu

l'hiver à Paris au siège central de la Société, on discute au point de vue du droit comparé certaines questions d'actualité. Je me permettrai de vous faire adresser les différents Bulletins parus depuis le commencement de 1900. Dans celui du mois de janvier vous trouverez, avec le règlement de la Société, une liste complète des membres tout correspondants que titulaires. Pour ce qui est les annuaires il me serait assez difficile de vous faire cet envoi, *L'Annuaire de Législation étrangère* étant un volume considérable de plus de 800 pages: en ce moment le Secrétaire général de la Société, M. Daguin, étant absent, je ne pourrais prendre sur moi de disposer d'un exemplaire. Dès son retour, j'aviserais à ce que cet envoi puisse vous être fait.

Notre Société par ses publications a propagé, non seulement en France, mais dans toutes les universités d'Europe, la connaissance des principales lois étrangères; c'est ainsi que nous avons traduit et publié toutes les lois anglaises les plus importantes de ces trente dernières années, et que par là elles ont pénétré dans les pays dont la langue se rattache à la nôtre, tels que l'Italie et l'Espagne, où nos collections sont très répandues.

Cette année, la Société de Législation Comparée a pensé qu'il pourrait être utile de provoquer un véritable Congrès de Droit Comparé, dans lequel on pût discuter entre savants et juristes des différents pays la fonction même le rôle du Droit Comparé pour le développement et le progrès de la science du droit prise dans sa généralité. C'est à ce Congrès, Monsieur le Président, que nous avons eu l'honneur de vous convier, en vous adressant à vous-même notre invitation personnelle, et en y joignant notre invitation collective pour la Société que vous présider.

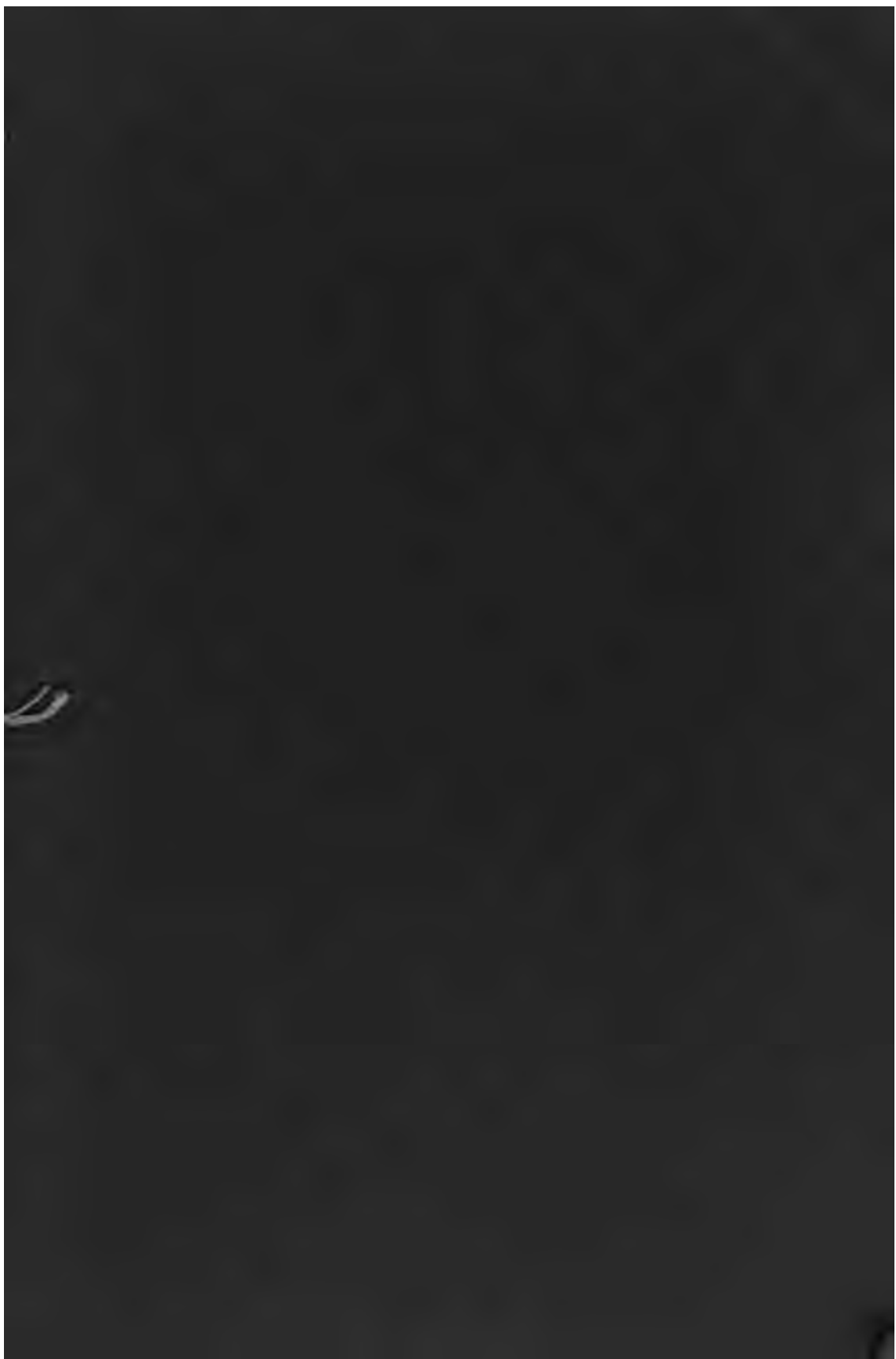
Je vais d'ailleurs vous faire adresser une vingtaine de nos programmes.

Aucun honneur ne pourrait nous être plus sensible que vous nous feriez en répondant à notre appel.

Veillez, Monsieur le Président, recevoir l'expression renouvelée de mes plus respectueux hommages.

R. SALEILLES,

Professeur à la Faculté de Droit en Université de Paris.







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